TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 172

MARINE TRANSIT CORPORATION AND TUG "GERALD A. FAGAN," BY MARINE TRANSIT CORPORATION, CLAIMANT, PETITIONER,

vs.

LOUIS LOUIS DREYFUS AND CHARLES LOUIS DREYFUS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 20, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,986)

(35,986)

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United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,
Libellant-Appellee,

against

MARINE TRANSIT CORPORATION,
Respondent-Appellant,

Diesel Tug "GERALD A. FAGAN",
MARINE TRANSIT CORPORATION,
Claimant-Appellant,

and

Barge "JOHN E. ENRIGHT".

Statement.

Dec. 14, 1928.—Filed libel and stipulation.

Apr. 18, 1929.—Answer of Marine Transit filed.

Aug. 20, 1929.—Filed note of issue, Motion for Arbitration.

Aug. 27, 1929.—Motion granted only as to issues raised by contract between libellant and Marine Transit Co., COXE, *J.*

Aug. 28, 1929.—Order granting motion, COXE, *J.*

Sept. 6, 1929.—Order resettling order of Aug. 28.

Jan. 24, 1930.—Filed opinion, COFFEY, *J.*, in reproduction of minutes by stenographer.

4 *Statement.*

Feb. 3, 1930.—Filed opinion, CAFFEY, *J.*, motion to confirm award granted.

Feb. 8, 1930.—Filed final decree confirming award of Committee on Grain, $25,047.16.

Feb. 14, 1930.—Order to show cause why libellant should recover from G. A. Fagin.

Feb. 28, 1930.—Opinion 5770, CAFFEY, *J.* Motion denied to restrain libellant.

Mar. 6, 1930.—Notice and order allowing appeal (Caffey, J.)

5 Mar. 7, 1930.—Filed order denying motion.

Mar. 28, 1930.—Filed consent and discontinuance as to J. E. Enright.

May 7, 1930.—Filed assignments of error.

May 7, 1930.—Filed notice of appeal.

Oct. .., 1930.—Filed additional assignments of error.

6

Libel.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The libel and complaint of LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners, doing business under the firm name and style of LOUIS DREYFUS & COMPANY

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc., in a cause of contract, collision and cargo damage, Civil and Maritime, alleges upon information and belief as follows:

FIRST: That at all the times hereinafter mentioned, libellants were and still are copartners doing business at No. 2 Broadway, City and State of New York, under the firm name and style of Louis Dreyfus & Company.

SECOND: That at all the times hereinafter mentioned the respondent, Marine Transit Corporation, was and still is a corporation organized and existing under and by virtue of the laws of the State of New York, having an office for the transaction of business at 17 Battery Place, Borough of Manhattan, City and State of New York, and has assets consisting of barges and Diesel tugs which are or will be during the pendency of process hereunder, within this district and the jurisdiction of this Honorable Court, and owns and/or charter and operate a number of such barges, of which the barge John E. Enright is one and Diesel tugs of which the Ger-

10 *Libel.*

ald A. Fagan is one, and by means of which it transported grain and other materials between the ports of Buffalo and New York City through the New York State Barge Canal.

THIRD: The Diesel tug Gerald A. Fagan is a tug of the motor type and at all the times hereinafter mentioned was used as a power unit in towing barges laden with grain and other materials from Buffalo and other ports along the New York State Barge Canal, to the port of New York and engaged in the transportation of merchandise for hire between such ports, among others.

11

FOURTH: The barge John E. Enright is a barge of the canal boat type engaged in the transportation of grain and other materials from the port of Buffalo and other ports along the New York State Barge Canal to the port of New York City but is without motive power of its own and is towed from one port to another.

FIFTH: The Diesel tug Gerald A. Fagan now is or will be during the pendency of process hereunder within the Southern District of New York and within the jurisdiction of this Honorable Court.

12

SIXTH: The barge John E. Enright now is or will be during the pendency of process hereunder within the Southern District of New York and within the jurisdiction of this Honorable Court.

SEVENTH: On or about September 13th, 1928 libellants shipped and placed on board the barge Edward A. Ryan at the port of Buffalo, 19,200 bushels of wheat in good order and condition, which wheat the respondent, Marine Transit Corporation,

agreed to carry on the said barge Edward A. Ryan to the port of New York and there deliver in like good order and condition as when shipped to the order of Bank of Nova Scotia, c/o Abell Forwarding Co., Inc., notify L. Dreyfus & Co., New York, New York, in consideration of an agreed freight then and there agreed to be paid to the respondent, Marine Transit Corporation, and in accordance with the valid terms of a certain booking contract, dated at New York, August 17th, 1928 and subject to the New York Produce Exchange Canal Grain Charter Party No. 1 as amended March 22nd, 1928, then and there executed and delivered to the said shipper by the said Marine Transit Corporation.

EIGHTH: Thereafter and on or about the said 13th day of September, 1928, the said Edward A. Ryan, having on board the aforesaid 19,200 bushels of wheat, left the port of Buffalo in tow of the Diesel tug Express for the port of New York via the New York State Barge Canal.

NINTH: That the said respondents did not deliver the aforesaid grain to libellants at the port of New York in like good order and condition as when received, but allowed and permitted said grain to be damaged in the following manner:

On or about September 25th, 1928 the Diesel tug Express with the barges Warren W. Clute, Frank, Vera M., Edward A. Ryan, George F. Barton and John E. Enright, in tow, was approaching the Federal Lock, Troy, New York with the barges two abreast, when about one-half mile west of the aforementioned lock, the said fleet was caused and permitted to ground at about 12:30 to 1 P. M. on the aforementioned day. The weather was good with clear visibility.

16 *Libel.*

The fleet was uncoupled and the Diesel tug Express took the barges Warren W. Clute, Frank and Vera M., in tow and continued eastbound, leaving the barges Edward A. Ryan, George F. Barton and John E. Enright, fast aground. Meantime the Diesel tug Gerald A. Fagan was dispatched west from Troy to float the barges Edward A. Ryan, George F. Barton and John E. Enright, which was done and the second fleet comprising the tug Gerald A. Fagan, barges Edward A. Ryan, John E. Enright and George F. Barton being towed in the order mentioned, started eastbound without survey or inspection, for the Troy Federal Lock. At this time the boats were coupled with lug lines only and the tug took the tier on short hawsers of about 25 to 30′ each in length. The barge John E. Enright was then down by the head. The tow continued eastbound in this order and upon approaching the Troy Federal Lock the tug in attempting to land the three boats, so carelessly and negligently maneuvered and operated as to cause the starboard corner forward of the Edward A. Ryan to graze the west concrete guard wall for a distance of about 10 to 15′ causing the bow of the headboat, the barge Edward A. Ryan, to come in forceful contact with the concrete corner recess of an outlet in the wall, subsequent to which the boat continued to graze along the wall and struck another recess just below the bulkhead, all of which caused considerable damage to the barge Edward A. Ryan, causing it to sink with its cargo of wheat in the west end of the Federal Lock chamber.

17

18

TENTH: That the aforesaid damage was not caused or contributed to in any way by the libellants or those for whom libellants were responsible.

ELEVENTH: That the aforesaid damage was caused solely through the fault, negligence and want of care of the respondents and those for whom the respondents are responsible in the following respects:

a. AS TO THE TUG GERALD A. FAGAN:

1. In that those in charge of the said tug were incompetent and inattentive to their duties.

2. In that the hook-up of the tier taken in tow of the tug was improperly made.

3. In towing a tier of three loaded grain barges on short hawsers.

4. In carelessly and negligently approaching the west concrete guard wall of the Troy Federal Lock.

5. In causing and permitting the barge Edward A. Ryan to strike the concrete wall.

6. Failure and inability to keep the tier in alignment behind the tug.

7. Failure to navigate with caution and care.

8. Failure to take into account the effect of a usual and well-known current.

9. In failing to have and maintain a proper and efficient lookout, and in other respects which will be pointed out at the trial.

22 *Libel.*

b. AS TO THE BARGE JOHN E. ENRIGHT.

1. By having and maintaining an incompetent master who was inattentive to his duties.

2. Failure to properly hook-up the lines between the headboat and the second barge, the John E. Enright.

3. Failure to steer properly and to follow the tug Gerald A. Fagan.

23 4. By allowing and permitting the barge Edward A. Ryan to strike the west concrete guard wall of the Troy lock.

5. Failure to take into account the effects of a usual and well known current.

6. Failure to navigate with caution and care and in other respects which will be pointed out at the trial.

TWELFTH: That by reason of the premises libellants have been damaged in the sum of Twenty Six Thousand ($26,000) Dollars, no part of which has
24 been paid although duly demanded.

THIRTEENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libellants pray that process in due form of law according to the course and practice of this Honorable Court in cases of Admiralty and Maritime Jurisdiction may issue against the said

Marine Transit Corporation, the Diesel Tug Gerald A. Fagan, its motors, equipment, etc., and the barge John E. Enright, its tackle, apparel, gear, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court be pleased to decree to your libellants their damages with interest and costs and that the Diesel Tug Gerald A. Fagan, its motors, equipment, etc., and the barge John E. Enright, its tackle, apparel, gear, etc., be condemned and sold to satisfy the same and that your libellants may have such other and further relief as in law and in justice it may be entitled to receive.

OTTO & LYON,
Proctors for Libellants,
60 Broad Sstreet,
New York City.

28 *Libel.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

L. STERN, being duly sworn, says:

I have read the foregoing libel and know the contents thereof and the same is true to the best of my knowledge, information and belief except such matters as are alleged on information and belief and as to those matters I believe it to be true; that the sources of my knowledge and information are reports and communications received and investigations made on behalf of the libellants.

29 The reason why this verification is not made by libellants is that libellants are copartners of a foreign partnership none of the partners being within this District or within the City of New York. Your deponent has a power of attorney to sign all necessary papers for the libellants.

L. STERN.

Sworn to before me this
11th day of December, 1928.

E. F. PLATOW,

30 Notary Public.

Queens Co. Clks. No. 2974, Reg. No. 3400
Kings Co. Clks. Nos. 135, Reg. No. 314
New York Co. Clks. No. 520, Reg. No. 0-951
Commission expires March 31, 1931

Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath.

1. Where and at what time did the tug Gerald A. Fagan first take in tow on the trip in question, the canal boats Edward A. Ryan, George F. Barton and John E. Enright.

2. Was this immediately after the said three boats had been aground about one-half mile west of Troy Federal Lock.

3. Was it the tug Gerald A. Fagan which dragged these three aforementioned barges off the place where they had been aground.

4. Was the tug Gerald A. Fagan assisted by any other tug; if so, which tug or tugs so assisted.

5. What assistance was rendered by John E. Matton & Sons' tug at the time of or before the tug Gerald A. Fagan arrived at the scene but after the tug Express had taken the barges Warren W. Clute, Frank and Vera M. away.

6. Did the barge Edward A. Ryan suffer any damage while aground or while being dragged off the bank. If so, state what it was.

7. Were any of the barges Edward A. Ryan, John E. Enright or George F. Barton surveyed or inspected at the time they were aground or shortly thereafter but before they were taken in tow by the tug Gerald A. Fagan.

8. Did the tug Gerald A. Fagan render any assistance in extricating the barges Warren W. Clute, Frank and Vera M.

34 *Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath.*

9. When and where did the Gerald A. Fagan, after leaving Troy westbound to take in tow the barges Edward A. Ryan, George F. Barton and John E. Enright pass the Diesel tug Express and her tow.

10. Did the Diesel tug Express have in tow at this time mentioned in the previous interrogatory, the barges Warren W. Clute, Frank and Vera M.

35 11. Did anyone for whom respondents herein would be responsible supervise the hook-up of the barges Edward A. Ryan, George F. Barton and John E. Enright after they were dragged off the bank, as set forth in Interrogatory #1.

12. How long were the hawsers between the tug Gerald A. Fagan and the headboat, the Edward A. Ryan.

13. Were the steering cables between the headboat Edward A. Ryan and the wheelboat John E. Enright in place and connected.

36 14. If your answer to the preceding interrogatory be in the negative, state where they were.

15. Were the lug lines between the barges taken up taunt.

16. If your answer to the preceding interrogatory be in the negative, explain just how the lug lines were rigged.

Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath. 37

17. How long did it take the tug Gerald A. Fagan with its consort aforementioned to go between the place where the boats were aground, as set forth in Interrogatory #1 and the Troy Federal Lock.

18. On which wall, stating whether the eastern concrete piers or the west guard wall, at Troy Federal Lock, did the tug attempt to land its tow.

19. When the tug Gerald A. Fagan was about 75′ from the jaws of the Troy Federal Lock at the northern end, what was the respective courses of 38

a. The tug, and

b. the tier of barges.

20. Did the headboat, Edward A. Ryan graze the west guard wall.

21. If your answer to the preceding interrogatory be in the affirmative, state exactly where:

a. The boat first contacted the wall, and

b. for what distance from the point indicated in answer to "a" did the boat continue to graze, and 39

c. did the starboard corner forward of the barge Edward A. Ryan strike the concrete corner of the first outlet or recess in that wall, and

d. If your answer to the preceding interrogatory be in the affirmative, did the boat continue grazing and strike another recess just below the bulkhead.

40 *Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath.*

22. What, if anything, did the tug Gerald A. Fagan do to prevent the headboat Edward A. Ryan coming in contact with the guard wall aforementioned.

23. Under what bell was the tug proceeding:

a. at the point about 75' west of the jaws of the western end of the lock,

b. at and just prior to the time the headboat struck the second recess, just below the
41 bulkhead.

24. What if any signals did the tug give the tier with respect to the contemplated approach of the lock.

25. If your answer to the preceding interrogatory states signals were given, were these signals acknowledged by the barges.

26. Was the deckhand on the tug Gerald A. Fagan, the member of the crew delegated to handle the lines and to act as lookout.

42

27. If your answer to the preceding interrogatory is in the affirmative, state where this member was just prior to and at the time of the first contact with the west guard wall at Troy Federal Lock.

28. Was the pool elevation of this lock normal at the time the barge Edward A. Ryan struck the wall.

Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath.

29. If your answer to the preceding interrogatory is in the negative, state the condition of the pool elevation at the aforementioned time.

30. Was the current in this level normal.

31. Did the barge Edward A. Ryan sink in the west end chamber of the Troy Federal Lock.

32. If your answer to the preceding interrogatory be in the affirmative, state with certainty the time of such sinking and the time it took the said barge to sink.

33. Describe the nature of the damage suffered by the barge Edward A. Ryan.

34. State the time the tug Gerald A. Fagan, the barge John E. Enright and George F. Barton left the Troy lock.

35. Attach a copy of the report of the accident made to the canal authorities, if one were made.

36. Give a complete itinerary stating the exact time of the movements of the Gerald A. Fagan between the time it left Troy, west bound, up to and including the time it left the Troy Federal Lock, eastbound, with the barges George F. Barton and John E. Enright in tow.

37. Did Marine Transit Corporation own and/or charter and operate the tug Gerald A. Fagan on the trip in question.

46 **Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath.**

1. Was the barge John E. Enright one of six boats that left Buffalo in tow of the Diesel tug Express on or about September 13th, 1928?

2. Did the John E. Enright, coupled to five other boats on the trip in question, ground about one-half mile west of Troy Federal Lock, opposite or near O'Shaunessy's Ice House?

47 3. If your answer to the preceding interrogatory be in the affirmative, explain the position in which these boats were lying at the time of the grounding.

4. Was the tier uncoupled for any reason?

5. Did the Diesel tug Express attempt to remove the entire consort?

6. Was it successful?

7. Did it succeed in dragging the barges Warren W. Clute, Frank and Vera M. off the bottom?

48 8. If your answer to the preceding interrogatory be in the affirmative state exactly when the boats were dragged off.

9. Did the tug Gerald A. Fagan assist in extricating the three barges aforementioned?

10. When did the Diesel tug Express with the three boats aforementioned leave the barges Edward A. Ryan, George F. Barton and John E. Enright?

Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath.

49

11. Were the barges Edward A. Ryan, George F. Barton and John E. Enright then still aground?

12. Where was the Diesel tug Gerald A. Fagan at this time?

13. When did the Diesel tug Gerald A. Fagan arrive to assist the barges Edward A. Ryan, George E. Barton and John E. Enright?

14. Did the Diesel tug Gerald A. Fagan subsequently drag off from the bank the barges Edward A. Ryan, George F. Barton and John E. Enright?

50

15. If your answer to the preceding interrogatory be in the affirmative, exactly when were the boats dragged off the bank?

16. Were the three barges, Edward A. Ryan, George F. Barton and John E. Enright then taken in tow by the Diesel tug Gerald A. Fagan? If so, give the order in which they were towed.

17. Did the tug Gerald A. Fagan's personnel supervise the hook-up of the tier of barges?

51

18. Were any steering cables in place and in use between the time the boats were aground about one-half mile west of Troy Federal lock, as set forth in interrogatory No. 2, up to and including the time the barge Edward A. Ryan struck the west guard wall?

19. If your answer to the preceding interrogatory be in the negative, state where the steering cables were.

52 *Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath.*

20. If your answer to interrogatory No. 18 be in the negative, was any complaint lodged by the captain of the Edward A. Ryan with respect to the absence of steering cables?

21. What was the length of the hawsers on which the tug Gerald A. Fagan took the tier of barges?

22. Was any steering done from the barges between the time they were aground one-half mile
53 west of Troy Federal Lock, as set forth in interrogatory No. 2, and the time the Edward A. Ryan struck the west guard wall?

23. Were any of the boats, Edward A. Ryan, George F. Barton and John E. Enright sounded, inspected or surveyed at all immediately after the time they grounded about one-half mile west of Troy Federal Lock, as set forth in interrogatory No. 2?

24. If your answer to the preceding interrogatory be in the affirmative, in any respect, state:

54 a. What if any damage was found?

b. What if any water any of the barges were making?

c. What attempt was made to keep the water at a minimum?

25. Was the barge John E. Enright down at the head on the trip from the point where the boats had grounded about one-half mile west of Troy Lock, as set forth in interrogatory No. 2 and the west guard wall of the Troy Federal Lock?

Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath. 55

26. On what wall of the Troy Federal Lock did the tug attempt to land the tier of barges?

27. What if any signals were given by the tug with respect to this contemplated landing?

28. What if any signals were given by the barges with respect to this landing?

29. When the tug was about 75 feet away from the jaws of the lock at the north end, what were the courses of 56

a. The tug, and

b. the tier of barges?

30. Were the lug lines between the barges taken up tight?

31. If answer to preceding interrogatory be in the negative, state just how they were rigged.

32. Did the quick water from the tug affect the movement of the barges?

57

33. Explain in detail the manner in which the tug attempted to land the barges at the guard wall or concrete piers at the north end of the Troy Federal Lock.

34. Did the starboard corner forward of the Edward A. Ryan graze the west concrete guard wall of the Federal Lock? If so, for how long before it struck the first outlet?

58 *Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath.*

35. After striking the first outlet, did the boat continue to graze and strike a recess just below the bulkhead?

36. State exactly the time of day and date the barge Edward A. Ryan struck the west guard wall at Troy Federal Lock.

37. Describe the nature of the damage suffered by the barge Edward A. Ryan.

59

38. How long after the barge Edward A. Ryan struck the wall did it sink?

39. State the time the Diesel tug Gerald A. Fagan and the barges John E. Enright and George F. Barton left the Federal Lock eastbound after the barge Edward A. Ryan sank.

40. Was the barge John E. Enright owned and/or chartered by the Marine Transit Corporation on the trip in question?

60

Answer to Libel.

61

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The answer of the Marine Transit Corporation, as respondent and as claimant of the diesel tug "Gerald A. Fagan" to the libel and complaint of Louis Dreyfus, et al., respectfully alleges:

FIRST: Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the libel marked First.

62

SECOND: On information and belief admits that the libellant shipped on board the barge "Edward A. Ryan" on or about September 13th, 1928 a cargo of wheat, the quantity and condition of which is unknown to the respondent and claimant herein, and for the true terms of the contract of carriage the claimant begs leave to refer to the original contract, which will be produced on the trial of this action; except as so admitted denies the remaining allegations contained in the paragraph of the libel marked Seventh.

THIRD: On information and belief denies the allegations contained in the paragraph of the libel marked Ninth except as the same may hereinafter be admitted or modified.

63

FOURTH: Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the libel marked Tenth.

FIFTH: On information and belief denies the allegations contained in the paragraph of the libel marked Eleventh.

64 *Answer to Libel.*

SIXTH: Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the libel marked Twelfth, except it admits no part of the sum demanded has been paid.

SEVENTH: Admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies all and singular the premises are true as alleged in the paragraph of the libel marked Thirteenth.

65 FURTHER ANSWERING THE RESPONDENT-CLAIMANT ALLEGES:

EIGHTH: That in the month of September, 1928 the respondent undertook to transport for the libellant a cargo of grain aboard the barge "Edward A. Ryan" from the Port of Buffalo to the Port of New York. That previous to the loading of the said barge respondent used due diligence to make the said vessel seaworthy and she was inspected and passed as seaworthy by the libellant herein; that the barge "Edward A. Ryan" was without motive power and that the respondent furnished the power
66 for towing the said barge, along with several other barges, all of which were properly manned and equipped and in all respects seaworthy for navigation and the towing unit furnished was also seaworthy and properly manned and equipped. In accordance with the custom of navigation on the canal the said barge "Edward A. Ryan" and the other barges with her were towed by the diesel boat "Express" from Buffalo to Troy where they were turned over to the claimant's tug "Gerald A. Fagan" for completion of the voyage to New York; that the

diesel tug "Gerald A. Fagan" at the time was in seaworthy condition, properly manned and equipped and the respondent herein had used due diligence to make her so.

NINTH: That any damage sustained by libellant is not recoverable from the respondent or claimant of the steamtug "Gerald A. Fagan", as said claimant had used due diligence to make all the vessels seaworthy at the time of the commencement of the voyage and the respondent-claimant is entitled to the benefit of the United States Statute, commonly known as the Harter Act. 68

FURTHER ANSWERING CLAIMANT ALLEGES:

TENTH: That on September 25th, 1928 at about 4:00 p. m. the barges "Edward A. Ryan", "John E. Enright" and "George F. Barton" were taken in tow by the steamtug "Gerald A. Fagan" a short distance above the U. S. Government lock at Troy, N. Y. The barges were arranged in tandem fashion and the "Gerald A. Fagan" took the boats in tow in the usual customary manner on two short hawsers. She then proceeded to tow the vessels to the Government lock at Troy. The tug entered the lock in the customary and usual fashion and the barges were following behind the tug when suddenly without any warning the barge "Edward A. Ryan" took a sheer to starboard towards the lock wall. At the time the tug "Fagan" was proceeding under one bell and the master immediately rang for full speed in order to prevent the sheer but before the engines were put full speed the barge struck the lock wall. At the point where she struck the lock wall there is a sluiceway and the only 69

70 *Answer to Libel.*

means for accounting for the sheer is that some unexpected current not discernible to the master of the tug caused the barge to get out of control and same happened without any fault or negligence on the part of the tug "Gerald A. Fagan" and those in charge thereof.

ELEVENTH: All and singular the premises are true.

WHEREFORE, respondent-claimant prays that the libel be dismissed with costs.

71

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Respondent-Claimant,
Office & P. O. Address,
44 Beaver Street,
Borough of Manhattan,
City of New York.

72

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

GERALD A. FAGAN, being duly sworn, deposes and says, that he is Treasurer of the MARINE TRANSIT CORPORATION, respondent-claimant in this action; that he has read the foregoing Answer to Libel and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the reason this verification is made 74
by deponent and not by respondent-claimant is that the respondent-claimant is a corporation and deponent is an officer thereof; that the sources of deponent's knowledge and the grounds of his belief as to the matters and things therein stated to be alleged, on information and belief are had from the regular course of his duties as such officer.

GERALD A. FAGAN.

Sworn to before me this
16th day of April, 1929.

SHIRLEY GEIER,
Notary Public. 75

Stipulation for Value. 73

(Seal of Continental Casualty Co.)

THE CONTINENTAL CASUALTY COMPANY
General Offices: Chicago

H. G. B. ALEXANDER
President

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

STIPULATION FOR VALUE 74

Entered into Pursuant to the Rules and Practice of this Court.

WHEREAS, a Libel was filed on the day of by DREYFUSS & COMPANY, as Owner of cargo lately laden on barge "EDWARD A. RYAN", against MARINE TRANSIT CORPORATION, as Owner of tug "GERALD A. FAGAN", for the reasons and causes in said libel mentioned;

AND WHEREAS, a claim to said vessel has been filed by MARINE TRANSIT CORPORATION and the value thereof has been fixed by stipulation at the sum of TWENTY-SIX THOUSAND AND 00/100 ($26,000.00) DOLLARS, for the purpose of bonding, and the parties hereto consenting and agreeing that if the Libellant, recover, the decree may be entered against them and each of them for an amount not exceeding the above agreed amount with interest thereon from this date, together with all costs of this action not exceeding TWO HUNDRED FIFTY AND 00/100 ($250.00), and that thereupon execution therefor may issue against their and each 75

73 *Stipulation for Value.*

of their goods, chattels, lands and tenements or other real estate.

NOW, THEREFORE, the condition of this stipulation is such, that if the claimant herein and the CONTINENTAL CASUALTY COMPANY of Hammond, Indiana with an office and usual place of business at #75 Fulton Street, New York, N. Y., the stipulator undersigned, shall abide by all orders of the Court interlocutory or final, and pay the amount awarded by the final decree rendered by this Court, and by any Appellate Court if an appeal intervene, with
74 interest as aforesaid, then this stipulation to be void; otherwise to remain in full force and virtue.

MARINE TRANSIT CORP.
GERALD A. FAGAN
Secy.-Treas.

CONTINENTAL CASUALTY COMPANY
By GILBERT WARNER
Attorney-in-fact.

By M. L. CROTTY
(Seal) Attorney-in-fact.

75

Taken and acknowledged this day of
before me.

(Seal) Notary Public

Notice of Motion to Refer Controversies to Arbitration. 73

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc. 74

SIRS:

PLEASE TAKE NOTICE that upon the pleadings and proceedings had herein and upon the annexed affidavit of Henry E. Otto sworn to on the 19th day of August, 1929, together with the exhibit attached to the said affidavit, we shall move this Court at a term thereof to be held for the hearing of motions in the Post Office Building, Borough of Manhattan, City of New York on the 27th day of August, 1929 at 10:30 o'clock A. M. on that day or as soon thereafter as counsel can be heard for an order referring the dispute between the libellants and the Marine Transit Corporation and the tug Gerald A. Fagan and barge John E. Enright to the Committee on Grain of the New York Produce Exchange and for 75

73 *Notice of Motion to Refer Controversies to Arbitration.*

such other and further relief in the premises as to the Court may seem just and proper,

Dated, New York, August 19, 1929.

Yours, etc.,

OTTO & LYON,
Proctors for Libellant,
60 Broad Street,
New York, N. Y.

74

To:

MACKLIN, BROWN, LENAHAN & SPEER, Esqs.,
Proctors for Marine Transit Corporation,
Claimant for tug Gerald A. Fagan,
44 Beaver Street,
New York, N. Y.

THOMAS A. MCDONALD, Esq.,
Proctor for Claimant barge John E. Enright,
15 William Street,
New York, N. Y.

75

Affidavit of Henry E. Otto, Read in Support of Motion for Arbitration. 73

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc. 74

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HENRY E. OTTO, being duly sworn, says: That he is one of the proctors for the libellants and is familiar with all proceedings heretofore had in the above matter. 75

On August 17, 1928, at New York City libellant and the respondent Marine Transit Corporation entered into a contract of booking, a copy of which is attached hereto and marked Exhibit A. According to the said contract of booking, the Marine Transit Corporation was to transport about 200,000 bushels of wheat for the libellants from Buffalo to New York City between September 1st and September 15th, 1928. The said booking contract by its

73 *Affidavit of Henry E. Otto.*

terms was subject to the New York Produce Exchange Canal Grain Charter Party No. 1 as amended. The said New York Produce Exchange Canal Grain Charter Party No. 1 as amended provided among other things the following:

> DISPUTES: All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding.

Pursuant to the aforesaid booking contract the
74 libellant shipped approximately 19,200 bushels of wheat from Buffalo on the barge Edward A. Ryan. Upon information and belief the said barge Edward A. Ryan and John E. Enright were chartered by the owners to the Marine Transit Corporation on a per diem basis and the Marine Transit Corporation became in law the owner pro hac vice of the said barges. The tug Gerald A. Fagan was the towing vessel. The said tug was owned by the respondent Marine Transit Corporation. The barge Edward A. Ryan while in tow of the tug Gerald A. Fagan was caused, allowed and permitted to sink in the Federal Lock at Troy, New York,
75 through negligence and want of care. Libellants caused a libel to be filed on December 14, 1928, and have obtained stipulation for value covering the tug Gerald A. Fagan. Issue was joined on April 17, 1929.

Due demand that the disputes involved in this litigation be arbitrated in accordance with the contract as hereinabove set forth was made on proctors for the claimant respondent Marine Transit Corporation. The proctors have refused to submit the controversies involved herein to arbitration.

The result of this arbitration is subject to the jurisdiction of this Court and does not divest this Court of jurisdiction of matters and things involved herein.

Wherefore deponent respectfully requests that an order be entered herein referring the dispute between the libellants and the Marine Transit Corporation and the tug Gerald A. Fagan and the barge John E. Enright to the Committee on Grain of the New York Produce Exchange.

HENRY E. OTTO.

Sworn to before me this
19th day of August, 1929.

WILLIAM H. CRAWFORD,
Notary Public, Kings County.
N. Y. Co. Clk.'s No. 237, et al.
Commission expires March 30, 1930.

73 **Exhibit A.**

MARINE TRANSIT CORPORATION
17 Battery Place
New York City

August 17, 1928

WE HAVE THIS DAY CONFIRMED BOOKING, CANAL FREIGHT:

BETWEEN: Marine Transit Corporation, Owners or Agents

AND: Louis Dreyfus & Company, Charterers.

74 THAT the said Owners or Agents will furnish insurable Canal Tonnage, for grain, as below:

QUANTITY: Two fleets, about 200,000 bushels wheat

PORT OF LOADING: Buffalo, N. Y.

DATE OF LOADING: September 1/15, 1928.

DESTINATION: New York, N. Y.

RATE: 6¼ cents per Bushels, NET TO BOATS

INSURANCE: CARGO AND FREIGHT, to be placed by and for account of Charterers, Carriers Liability to
75 be placed by and for account of Owners or Agents.

OTHER TERMS: Subject to New York Produce Exchange Canal Grain Charter Party No. 1 as amended.

MARINE TRANSIT CORPORATION,
Owners or Agents
(Signed) GERALD A. FAGAN

LOUIS DREYFUS & COMPANY
Charterers
(Signed) J. G. BENNETT

Memorandum of Judge Coxe. 73

ENDORSED ON MOTION PAPERS.

"Motion granted only as to the issues raised by the contract between the libellants and the Marine Transit Corporation. Settle Order on Notice."

ALFRED C. COXE,
U. S. D. J.

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76 **Order, Dated August 28, 1929.**

At a Stated Term of the United States District Court, held in and for the Southern District of New York at the Court Rooms of said Court in the United States Court & Post Office Building, in the Borough of Manhattan, City of New York, on the 28th day of August, 1929.

Present—Honorable ALFRED C. COXE, *U. S. D. J.*

77 LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

78 Libellants having made a motion for an order referring the dispute between the respective parties to the Committee on Grain of the New York Produce Exchange and said motion having duly come on to be heard at a Stated Term of this Court for the hearing of motions and after hearing Henry E. Otto, of counsel for libellants in support of said motion and E. L. Lamb, of counsel for Marine Transit Corporation and the tug Gerald A. Fagan and Thomas A. McDonald, of counsel for the barge John E. Enright both in opposition thereto and due

deliberation having been had, on motion of Otto & Lyon, proctors for libellants, it is

ORDERED that the said motion be and the same hereby is granted in so far as it affects the Marine Transit Corporation, and it is

FURTHER ORDERED that Marine Transit Corporation submit to arbitration before the Committee on Grain of the New York Produce Exchange any and all disputes and controversies under the contract dated August 17th, 1928 between Marine Transit Corporation and Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York.

ALFRED C. COXE,
U. S. D. J.

82 **Order Resettling Order of August 28, 1929.**

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Court Rooms of said Court in the United States Court & Post Office Building, in the Borough of Manhattan, City of New York on the 6th day of Sept. 1929.

Present—Honorable ALFRED C. COXE, *U. S. D. J.*

83

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

84

Upon the annexed consents and on motion of Otto & Lyon, proctors for the libellants, it is

ORDERED that the order entered herein on the 28th day of August, 1929 be resettled and amended to read as follows:

ORDERED that the said motion be and the same hereby is granted only as to the issues raised by the contract between the libellants and the Marine Transit Corporation

and it is

FURTHER ORDERED that Marine Transit Corporation submit to arbitration before the Committee on Grain of the New York Produce Exchange any and all issues under the contract dated August 17th, 1928 between the Marine Transit Corporation and Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York.

ALFRED C. COXE,
U. S. D. J.

We hereby consent to the entry of the foregoing order and waive notice of settlement.

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Marine Transit Corp.

THOMAS A. McDONALD,
Proctor for the Barge John E. Enright.

88 **Case.**

LOUIS DREYFUS & COMPANY

and

MARINE TRANSIT CORPORATION.

October 4, 1929.

Arbitration before the Committee on Grain, of the New York Produce Exchange, pursuant to the
89 attached order.

Present: GRAIN COMMITTEE,

Messrs. A. C. Field, Chairman;
James O'Donohoe,
C. N. Hitchcock,
James H. Bowne,
Walter Trappe.

Messrs. OTTO & LYON,
(Mr. Otto) for Louis Dreyfus & Company.

Messrs. MACKLIN, BROWN, LENAHAN & SPEER,
90 (Mr. Lenahan) for the Marine Transit Corporation.

Adjourned to December 11, 1929.

Richard J. Kaiser. Called by Libellant. Direct. 91

Met pursuant to adjournment, December 11, 1929.

RICHARD J. KAISER, being duly sworn and examined as a witness on behalf of Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. By whom are you employed? A. Louis Dreyfus & Company.

Q. Are you familiar with the shipment of grain, ex barge Edward A. Ryan, Buffalo, New York? A. 92
Yes.

Q. I hand you a contract between the Marine Transit Corporation and Louis Dreyfus & Company, and ask whether that is the original contract dated August 17, 1928, entered into between the Marine Transit Corporation and Louis Dreyfus & Company? A. It is.

Mr. Otto: I offer the contract in evidence. It is marked Dreyfus Exhibit 1.

Q. Is this a printed form of the charter party of the New York Produce Exchange (handing wit- 93
ness paper), to which this booking contract refers? A. It is.

Mr. Otto: I offer it in evidence.
It is marked Dreyfus Exhibit 2.

Q. Is this a certificate (handing witness paper) showing quantity of grain loaded into the barge Edward A. Ryan? A. Yes.

94 *Richard J. Kaiser. Called by Libellant. Direct.*

Mr. Otto: I offer it in evidence.

It is marked Dreyfus Exhibit 3.

Q. Did Louis Dreyfus & Company deliver to the Marine Transit Corporation a shipment of 19,200 bushels of No. 4 Manitoba wheat, on September 13, 1928? A. They did.

Q. Did Louis Dreyfus & Company receive any part of this grain at any time? A. No.

Q. Are you familiar with the market value of grain of this kind? A. I am.

95 Q. Can you state what the market value of this grain at New York, on September 25, 1928, was? A. 1.19⅞.

Q. Is this a statement of your damages (handing witness paper), as you understand them to be? A. It is.

Mr. Otto: I offer the statement of damages in evidence.

It is marked Dreyfus Exhibit 4.

The Chairman: Do I understand Louis Dreyfus & Company did not receive any part of this shipment of grain at any time?

The Witness: They did not.

96 Mr. Lenahan: You are not the gentleman who signed the contract in behalf of Louis Dreyfus & Company, are you?

The Witness: No, sir.

Mr. Lenahan: Did you handle the collection of these claims of Louis Dreyfus & Company for damaged cargoes?

The Witness: It is usually handled by the bookkeeping department.

Mr. Lenahan: What I mean is, you had the cargo insured, did you not?

The Witness: Yes, Louis Dreyfus & Company.

Mr. Lenahan: You have been paid, haven't you?

The Witness: No, we have not been paid.

Mr. Lenahan: You have had an advance.

The Witness: We received a loan.

Mr. Lenahan: Have you got the loan receipt?

The Witness: Yes.

Mr. Lenahan: Can you produce that receipt?

Mr. Otto: The contract provides both parties 98
insure—carrier's insure their liability, and the shipper insures the cargo. I do not see that it is relevant, but if you want them I will be glad to present them.

The Chairman: If it is not an insurance matter, what is the controversy?

Mr. Otto: The controversy is this, that the grain was delivered to a carrier in Buffalo for delivery in New York. The grain shipper, Louis Dreyfus & Company, did not receive any of the grain. They have insurance against cargo lost. The carrier has insurance against carrier's liability. Louis Dreyfus & Company 99
presented a claim to the underwriters, in normal course, and they advanced to Louis Dreyfus & Company an amount, as a loan, the same to be paid out of this recovery. Therefore, I do not see how it affects the situation in any way. The rights under the contract, whether Louis Dreyfus & Company or the underwriters, are the same. Dreyfus & Company has not been paid. Mr. Kaiser has so testified.

Mr. Lenahan: That is only a subterfuge. Let's have the loan receipt.

The Chairman: It seems to me your controversy is on the value of this grain.

Mr. Otto: The amount of the loss, yes.

Mr. Lenahan: The insurance figures into it quite extensively.

Mr. Otto: As I see it, the rights of the parties are governed by this contract. If the carrier is liable it is by virtue of this contract. If the shipper is entitled to recover, it is by virtue of this contract. If there were any question of insurance, that is only a secondary matter, that is an adjustment which may take place after this case is determined, and not before.

101

The Chairman: We have not gone into it far enough to get an idea of what you are driving at. It does not seem to me this receipt can be of any disadvantage to anyone to put it in evidence.

Mr. Otto: I have no objection, as I said, although I do not see how it is relevant.

The Chairman: Well, let us decide that.

Mr. Lenahan: I offer the receipt in evidence. It is marked Dreyfus A and Dreyfus B.

(The receipt was loaned by Mr. Otto to Mr. Lenahan.)

102

Mr. Otto: We have shown that the grain was delivered to the Marine Transit Corporation in Buffalo, pursuant to this contract, and that the carrier has totally failed to deliver any of it to Louis Dreyfus & Company, New York. We have also shown the amount of the loss and the market value, and show that they have neither delivered the grain to Louis Dreyfus & Company nor shown its failure to so deliver was not due to its fault or negligence.

The Chairman: It is your contention that it was due to their fault?

Mr. Otto: Yes.

The Chairman: Do you want to put in testimony to that effect?

Mr. Otto: I believe it is up to the carrier to put in testimony to show what happened. As the grain was delivered to the carrier, they know best what happened to it, and I believe it is up to them to explain what happened.

104

J. McGOWAN, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

BY MR. LENAHAN:

Q. What is your business? A. Steamboat captain.

Q. On the 25th of September, 1928, what vessel were you in command of? A. The Gerald A. Fagan.

Q. How long have you been engaged on steamboats? A. Six years.

Q. At that time, how long had you been on the 105
Canal? A. About two years—2½—something like that.

Q. Do you recall taking the barge Edward A. Ryan in tow on September 25, 1928? A. Yes, I do.

Q. How many other barges were in the tow? A. There were three.

Q. Where did you take them in tow? A. From a place called O'Shaughnessy's icehouse.

Q. Where were you going to tow them to? A. New York.

106 *J. McGowan. Called by Respondent. Direct.*

Q. At the time, were the barges loaded or light? A. Loaded.

Q. With grain? A. Grain—I guess so.

Q. You hadn't brought them down the Canal—they had been brought down by another tug—is that right? A. Yes.

Q. This tug was engaged in towing between Waterford and New York? A. Yes.

Q. How did you arrange the barges when you took them in tow? A. We took them from another tug. I believe Matton's tug.

107 Q. How were they arranged? A. One after the other, made fast.

Q. What was the head barge? A. The Ryan—I forget the first initial.

Q. The second barge was what? A. The Enright.

Q. The third? A. The Barton.

Q. Was there any space between the stern of the head barge and the bow of the second barge? A. No—coupled right up tight.

Q. How many lines were made fast between the stern of the head barge and the bow of the second barge? A. That I do not know for sure.

Q. Did you see them? A. No.

108 Q. You do not know whether they had cross or lug lines? A. I could see lines on the side—called lug lines.

Q. Before you got down into the Hudson River proper, you came through a lock? A. Yes.

Q. What is the name of the lock? A. U. S. Government Lock, Troy, New York.

Q. Have you towed barges through there many times? A. Quite a few.

Q. All this summer, haven't you? A. Yes.

Q. All last summer? A. Yes.

Q. All the season before, didn't you? A. Yes.

Q. Alongside of this Government lock at Troy, is the Hudson Dam, is that right? A. Yes.

Q. Before you get to the lock gates, is there any other pier there? A. A long pier extending out about—I should judge 200 feet—150—200, I guess.

Q. You mean from where you entered the lock, this wall extended out? A. From the lock gates.

Q. That is, as you were coming in that day, which side is that on—starboard side? A. Starboard side.

Q. Right-hand side? A. Right-hand side.

Q. What is that wall constructed of? A. Con- 110
crete.

Q. Is there any fender protection along the wall? A. No, there is not.

Q. At the time you went to the lock on the date in question, were you on watch on your tug? A. No sir, I was not.

Q. Who was? A. James Flynn.

Q. The mate? A. The mate.

Q. Were you out around the deck that day? A. I was out on deck, yes.

Q. Did you see the barge after he got inside of this long wall? A. I did.

Q. How were they following behind the tug then? 111
A. Coming right straight.

Q. Before you go further—how did the tug have the tow? A. She had two short hawsers of about 40 feet, something like that.

Q. Where did these hawsers lead from on the tug—where were they made fast? A. On the stern bitts, as they call it.

Q. These were about 15 to 20 feet from the end of the tug? A. Yes.

Q. Where did they lead to on the barge? A. To the corner—each outside corner of the barge.

Q. In other words, they are made fast to a cleat? A. Yes.

Q. That cleat is situated on the outboard corner, is that right? A. Yes.

Q. One on the starboard side and one on the port side? A. Yes.

Q. What is the idea of two short hawsers rather than a single one? A. Well, it is to control your boats better.

Q. Is that the usual and customary way of towing into this lock on two short hawsers? A. Some
113 come in on short and others on long.

Q. Was this out of the ordinary—the way you were doing? A. No.

Q. You had been doing it before? A. Yes.

Q. You have seen other people do it? A. Yes.

Q. You have done it yourself? A. Yes.

Q. After you got inside of this wall that you talk about, and you say that wall runs how far out from the gates of the lock? A. About 200 feet, as nearly as I can figure.

Q. When you got inside of that wall, did you see the barges then? A. Yes.

Q. How were they coming then? A. They were
114 coming right straight.

Q. One behind the other? A. One behind the other.

Q. How was the tug being operated as to speed at that time? A. She was under a slow bell—as slowly as she could run.

Q. When you saw them that time, how far were they away from this wall? A. About 8 or 10 feet.

Q. Then what happened shortly after that? A. I noticed they hooked up.

Q. What did? A. The boats.

Q. What happened to the line—did she change her position any—or course? A. Yes, she took a dive toward the wall.

Q. Did the captain try to break that dive? A. Yes.

Q. How did he? A. By steering his tug to the starboard, pulling the boats over from the wall.

Q. In the method you were doing, do you know, or can you give any reason to account for the dive or sheer this tug took? A. Not unless it is the pull from that end of that 200 foot wall.

Q. What do you mean pull? A. The water sometimes—the Ford Plant draws water on the other side of the river. 116

Q. Where is Ford's plant with reference to the Government Lock? A. On the east side of the lock.

Q. Where is it in reference to the dam? A. The mill is right at the dam.

Q. How far is that dam from the end of this long concrete wall, approximately? A. I should say 1,000 feet.

Q. Have you observed at other times, any set to the current of the river at this point? A. I have.

Q. How does it set? A. It sets toward the Ford Plant.

Q. Do you know whether or not Ford draws water at that point? A. He does—above the lock. 117

Q. When the barge took this sheer, was there any opening in this concrete wall? A. Yes, there was.

Q. I show you this picture, and I ask you if that correctly represents the situation along that lock wall? A. Yes, sir, it does.

Mr. Lenahan: I offer the photograph in evidence.

It is marked Marine A.

118 *J. McGowan. Called by Respondent. Direct.*

Q. What part of the barge struck the wall? A. The bow on the starboard side.

Q. Whereabout on the wall did it strike? Can you give us some point that we can fix the location? A. Right in that sluiceway in the wall.

Q. Was there any fender piling of any kind protecting the corner? A. No, sir, there was not.

Q. What happened then? A. I got over on the boat and put a canvas down, thinking I could stop the leak.

Q. You mean on the principle that if there was a hole, the suction would draw the canvas into the
119 hole, is that it? A. Yes.

Q. Was the canvas drawn into the hole? A. No, sir, I could not get it to take hold no way.

Q. Was any damage visible to you when you went over there? A. Yes, sir.

Q. How far down did you get the canvas? A. I thought I had it down to the bottom of the boat, so I went down in the bow and couldn't see any break there either.

Q. Then the boat sank, is that it? A. Yes.

Q. How long an interval from the time she hit until the time she was completely submerged? A. About half an hour.

120 Q. Did you see the barge when she was placed on drydock the following spring? A. Yes.

Q. Where did you see her at that time? A. Hildebrandt's Drydock.

Q. Did you observe the bow then? A. Yes, I looked at it.

Q. What did you find on the starboard side of the bow? A. I see a hole at the bottom of the boat, about, I should judge, 3½ high and 2 feet wide.

Q. Outside of that damage at that point in that hold was there any damage on the starboard side of the bow besides that? A. I did not see any.

Q. Do you know the purpose of that sluiceway in that concrete wall? A. Yes, I do.

Q. What is the purpose? A. To put driftwood out so it will not go down into the gates.

Q. Have you owned barges on the Canal? A. Yes, I have.

Q. Operated them yourself? A. Yes.

Q. You are a steamboat man? A. Yes.

Q. Now, from the nature of the break, as you saw it on the boat, did you form any opinion as to what happened to the boat? A. It looked to me as though there was something at the bottom of that 122 wall.

Q. That what? A. That caused the hole.

Q. It was a puncture? A. It looked that way.

Q. No damage on the top? A. No, sir.

Q. The boat is about how high? A. I should say 12 feet—13 feet.

Q. How far from the deck of the barge was the top of this hole? A. I should say 6 or 8 feet.

Q. In that intervening 6 or 8 feet, were there any broken planks in there? A. I did not notice any.

Q. Any cracks? A. I did not notice any.

CROSS EXAMINATION BY MR. OTTO: 123

Q. Do I understand, Captain, that you have been through this lock the past summer or the summer before? A. Yes, sir.

Q. Isn't it a fact this tug Gerald A. Fagan did not proceed through this lock and north of this lock before the date of this accident—isn't this the first trip of the Fagan through that lock? A. Yes, it is.

Q. On what boat were you before the date of this accident? A. I was on the E. O'Boyle.

124 *J. McGowan. Called by Respondent. Cross.*

Q. The date of the accident is the first time this tug went through the lock and north of the lock? A. Yes.

Q. Is there any particular reason why this tug never went on the Canal before or through the lock? A. Yes, she had a high stock before, and was not equipped to go up there before.

Q. Isn't it a fact it is a pretty big boat? A. No. There are boats up there bigger.

Q. She was over 80 feet long? A. I do not know just what the length is.

125 Q. You have been captain of the boat? A. Yes.

Q. Suppose I should say, according to the measurements on file with the authorities, the boat's length was over 80 feet. Would you judge that to be a larger or smaller boat than the average plying on canals? A. This is quite a big boat.

Q. As a matter of fact, are there any tugs as large as that, which would navigate the Canal through the narrow channel north of the lock with three or more loaded barges? Can you state one? A. I believe I can—the Winthrop.

Q. Any others? A. The canalers are 96 feet long.

Q. Will you name one? A. The Austin.

126 Q. How long is that? A. She is 96 feet or over.

Q. Do you know anything about the condition of the water level on the date of this accident? A. No, I do not.

Q. The captain of the tugboat was supposed to know the condition of the water. Isn't it the duty of the captain to know the condition of the water? A. I do not see why? There is no tide there.

Q. No current? A. There is a current, yes.

Q. Do you know that to be a fact? A. I do.

Q. On the date of this accident, was there any current where this boat fetched up? A. I do not know that.

Q. If I were to tell you, on the date of this accident, the water level was 2 feet below normal, would that affect the situation any? A. It would not, if Ford was not working his plant.

Q. Is not the current determined by the quality of water going over the dam? A. Not if it is 2 feet below normal—there would not be any going over.

Q. Then would there be any current? A. I suppose there would—Ford draws water enough. 128

Q. You do not know anything about currents then, or about water levels? A. I do not know just how it would—I would have to inquire from the lock to find that out.

Q. Now these three barges were close up? A. Yes.

Q. Two short hawsers about 30 feet? A. 30 or 40 feet, I said.

Q. So the tug would have to steer these three boats as really one boat, wouldn't it? A. I suppose it would.

Q. Well, would it? A. As a rule they follow right behind the tug.

Q. Would the tug have to two these three boats, if they are closely coupled, as one boat or one unit? 129 A. I think so.

Q. So that if it wanted to maneuver, it would have to maneuver three boats instead of one? A. Yes, that is right.

Q. In view of the two short hawsers, isn't it a fact the tug has complete control of the barges? A. As a rule, yes.

Q. Complete control of the steering of the barges? A. Well, I don't know anything about that.

130 *J. McGowan. Called by Respondent. Cross.*

Q. You know whether the tug controls the steering of the barge? A. I know she did control them until she got right to that point, when she took a sheer, whatever caused it.

Q. Was there any steering apparatus set up on this barge at all? A. That I do not know.

Q. You were there? A. Yes.

Q. You saw conditions before and after, didn't you? A. The short hawsers on them.

Q. Can you state, as a matter of fact, there was no steering apparatus set up on this barge at the time you picked them up? A. I couldn't swear to
131 it, no.

Q. You are captain, and it is the duty of the tug to make up the tow? A. The tow was already made —I took it from another tug.

Q. Isn't it a fact the tug Gerald A. Fagan pulled the Enright off when she was aground at O'Shaughnessy's? A. We did not pull her out. That was Matton's tug.

Q. You were not on watch? A. No.

Q. The mate was in charge? A. Yes.

Q. Is he here? A. Yes.

Q. What shift did you have? What is your regu-
132 lar shift? A. Mine was in the fore part—6 a. m. to noon.

Q. This accident happened about 5? A. Around that time.

Q. When did you have your rest then, Captain? A. We laid down at Troy for about six or eight hours, I believe.

Q. If you were on watch between 6 a. m. and 12 noon, and the mate relieved you at noon, and you expected to go back on watch at 6 p. m., when did you get your sleep? A. From early in the morning until noontime.

Q. From early in the morning until noon—if you were on watch from 6 to 12, you would not be asleep? A. I can lay down and sleep, as we have no work to do.

Q. You looked at the barges when you picked them up, didn't you? A. Yes.

Q. You noticed whether they were made up properly? A. They looked to be made up properly—one behind the other.

Q. You know something about whether a steering apparatus is set up on the barge or not? A. I see the steering apparatus, but whether it was set up for use I don't know. 134

Q. The steering apparatus was set— A. It was set on the bow.

Q. You do not know whether they were set up for use? A. I could not swear to that.

Q. I think you said that the barge struck right in the sluiceway, is that right? A. The lower end of the sluiceway.

Q. Isn't it a fact this barge struck about 18 feet from the sluiceway? A. No, sir.

Q. Isn't it a fact the tug continued full speed ahead slightly to starboard and dragged the boat for about 18 feet before she hit the sluiceway? A. No, sir. it wasn't under full speed at any time. 135

Q. I believe you testified that you were running under one bell, is that correct? A. They give slow bell—that is still slower than one bell.

Q. Did you testify you were operating under one bell, on direct examination—did you previously testify that the tug was proceeding under one bell? A. Under a slow bell, I said.

Q. What speed? A. Between stop and a slow bell.

Q. One bell is less than a slow bell? A. Slow bell is less than one bell.

136 *J. McGowan. Called by Respondent. Cross.*

Q. How did the tow approach this lock? A. One behind the other, as straight as could be.

Q. Did they approach from the east towards the west wall at an angle? A. No—right straight down for the lock.

Q. At the place where this boat first struck the lock wall, that is the west wall, is there any current? A. There is an offset there.

Q. Isn't it a fact it is dead water? A. Yes, dead water there, but when the mills are running, there is a draw to the west.

137 Q. Do you know whether the mills were working at that time? A. I couldn't swear to that.

Q. Isn't it a fact, Captain, you have been employed for towing between New York and Troy and not north of Troy? A. I cannot answer that, I would go wherever I was sent.

Q. Whether you were employed to tow between New York and Troy? A. No, I was not employed —there was no place mentioned—whether Waterford or Troy.

Q. Before this accident, did you do any towing north of Troy? A. I was not on long after the accident. I do not know where she went after that.

138 Mr. Lenahan: I object to that question. It is wholly immaterial.

Objection sustained.

Q. This particular boat, the Fagan, did you ever pick up any other boats north of Troy? A. Yes, I did. I went there after coming there—I did go there after.

Q. Before this accident? A. After the accident.

Q. Do you know what horsepower this tug Fagan has? A. I do not know for sure, I heard she had 300.

Q. Do you know how wide the opening is to the approach to the lock between the bullnose over the upper guide wall and the lock wall? A. I do not know just how wide it is, no.

Q. Can you judge, or estimate? A. I suppose about 100 feet.

CHAIRMAN (to counsel):

Q. Can you have someone here who is familiar with it, draw us a little rough sketch as to just how the dam, the Ford Plant and the lock and this long wall—so we can get a little clearer idea? 140

The Committee and counsel examine blueprint.

Q. This disaster happened in broad daylight? A. Yes.

Q. Any wind? A. No, not that I remember.

Q. Any unusual navigation conditions? A. No.

Q. I show you a photograph, and will ask you to identify where, on this picture, the Ryan struck first?

The witness indicates with a cross. 141

Mr. Otto: I offer the photograph in evidence. It is marked Dreyfus 5.

Q. Do you know the length of that wall from the jaws of the lock to the bullnose of the guide wall? A. Somewhere around 200 feet, I guess.

Q. Do you know the length of the opening of the recess there in the guide wall, where you indicated the boat struck? A. I do not know.

Q. Have you any idea? A. I suppose about 10 feet.

142 *J. McGowan. Called by Respondent. Redirect.*

REDIRECT EXAMINATION BY MR. LENAHAN:

Q. I forgot to ask you what license do you hold? A. 500 master's.

Q. From the United States Local Inspectors? A. Yes.

Q. Mr. Otto asked you about the size of the tugboat. How long is the towing steamer you were on last year? A. 110 feet.

Q. Do you know the Diesel tug Maple Leaf? A. Yes.

143 Q. Is she longer than the Fagan? A. About the same length.

Q. Do you know the Silver Leaf? A. I do.

Q. Do you know the tug Sherman? A. I do.

Q. How does she compare with the Fagan? A. I believe she is longer.

Q. How long is the steamer R. Lenahan? A. 150 feet.

Q. How big is the tug Southern Cross? A. As long as the Fagan.

Q. Do all these vessels operate up there? A. Yes.

Q. What is the horsepower of the steamer Lenahan? A. I don't know—somewhere around 500, I believe.

144 Q. What is the horsepower of the Sherman? A. I don't know.

B. S. Oakley. Called by Respondent. Direct. 145

B. S. OAKLEY, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

BY MR. LENAHAN:

Q. In September, 1928, were you employed by the Marine Transit Corporation? A. Yes.

Q. Do you know the barge Edward A. Ryan? A. I do.

Q. Do you recall the barge Ryan loading in September 1928? A. I do.

146 Q. You operated the Edward A. Ryan along with several other barges, is that right? A. That is right.

Q. On this trip out of Buffalo, they were in tow of the tug Express? A. They were.

Q. Did you see the Express when in Buffalo? A. I did.

Q. Do you know Captain Lawton? A. Yes, I do.

Q. Did you see the barge Edward A. Ryan? A. Yes.

Q. Did you inspect her? A. Yes.

Q. What is your duty as regards these barges, when they come into Buffalo? A. To make sure of the proper number of lines and the conditions, 147 that the boats are seaworthy.

Q. A man by the name of Fred Lawton is captain? A. Yes.

Q. He had navigated boats down the Canal before, had he? A. Yes, he had.

Q. The other barge in tow—did you know the captain of the barge Vera M.? A. I do, his name is Moharzel.

Q. Had he been on the Canal previous to this? A. He had.

148 *B. S. Oakley. Called by Respondent. Direct.*

Q. And his son Edward? A. I did.

Mr. Otto: He had been on the Canal?
The Witness: Yes.

Q. The captain of the Enright? A. I knew who he was.

Q. You knew he had been engaged on the Canal prior to this? A. I did.

Q. Fred Noel? A. I knew him.

Q. And Crossen? A. Yes.

Q. And the barge Vera M.—did you see her be-
149 fore she loaded in September? A. Yes.

Q. The Frank? A. Yes.

Q. The Emily, the Ryan, the Clute and the Barton also? A. Yes.

Q. As a matter of fact, were you the only one who inspected the barges? A. With the exception of the Inspector who passed them for cargo.

Q. You knew the owner of the cargo had a representative inspect the barges before they loaded? A. Yes.

Q. Did they give you a certificate that the barge was in good condition, or just to load? A. Yes.

Q. Is this the certificate you received (handing
150 witness paper)? A. Yes, it is.

Q. Did you receive a seller's certificate for the receipt of the barge? A. Yes.

Q. On all the barges you go abroad, you have a talk with the captain when he arrives in Buffalo? A. Yes.

Q. Do you ask if there is anything wrong? A. Yes.

Q. If you find anything wrong, you have it fixed before they leave, I suppose—you testified you are with the Marine Transit Corporation, you are in

charge in Buffalo, and inspect the boats when they come in—you are stationed at Buffalo all during the Canal season? A. Yes, I am.

Mr. Lenahan: I offer the certificate in evidence.

It is marked Marine B.

Q. On this trip in September, you loaded grain belonging to Louis Dreyfus & Company on the Edward A. Ryan? A. Yes.

Q. 19,200 bushels? A. Yes, I remember that.

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Q. You have testified that you know these barge captains were men who had experience in navigating on the Canal? A. Yes.

Q. In your opinion, they were representative men? A. Absolutely.

Q. Do you know the engineer of the Express—Ike? A. Yes.

Q. You knew he operated this Diesel engine—and Captain Lawton? A. Yes.

Q. Was the Express fully manned when she left Buffalo? A. Completely.

Q. The barges? A. All of them.

CROSS EXAMINATION BY MR. OTTO: 153

Q. Did you know the tug Gerald A. Fagan before this? A. No, I did not.

154 *Gerald A. Fagan. Called by Respondent. Direct.*

GERALD A. FAGAN, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

BY MR. LENAHAN:

Q. You are an officer of the Marine Transit Corporation? A. Yes.

Q. What office do you hold? A. Vice-President and Treasurer.

Q. They are the owners, charterers of operating owners of the Express—the Diesel tug? A. They
155 are operating owners of the Express.

Q. And the tug Gerald A. Fagan? A. Yes.

Q. The barge Edward A. Ryan—was that being operated by the Marine Transit Corporation in 1928? A. It was operated under charter.

Q. Do you know what repairs had been put on the barge in the spring of 1928? A. In the spring of 1928, the barge had been thoroughly overhauled at considerable expense, and to my knowledge she had a whole new bottom put on her.

Q. You saw the barge before you chartered her? A. I did.

Q. Did you see her during the summer? A. I
156 may have once or twice.

Q. At any rate, you did not have any trouble carrying dry cargo? A. She always delivered her cargo in first-class shape.

Q. The Diesel Express—the Captain—what was his name? A. Lawton.

Q. Had you known him before he became master of the steamboat? A. He is duly licensed, I have known him quite a while.

Q. Did you know Joseph McGowan before you hired him for the steamboat Gerald A. Fagan? A. Yes, I knew he had quite considerable experience.

Q. Who was the mate? A. A man by the name of Flynn.

Q. Had you known him before you employed him? A. Yes, he was with the New Haven Railroad for sometime.

Q. He had been employed by Cummings? A. I believe so. He is duly licensed.

Q. Never had any trouble with him, did you? A. Never.

Q. Both competent men, you will say? A. Very competent.

Q. Did you hear the engineer of the Express testify? A. I did. 158

Q. Who was the engineer on the Fagan? A. I guess it was Fagan—Elmer.

Q. Had you had him previous to this time? A. Yes, for five or six years.

Q. Found him competent? A. Very competent.

Q. Now the tug Gerald Fagan—when was she overhauled prior to this accident? A. Completely overhauled in Augus[redacted] finished August 15, 1928.

Q. Was she in seaworthy condition? A. At considerable expense.

Q. Did you have any reports of any trouble or damage to the Ryan prior to this accident in the lock at Troy? A. I had no reports whatsoever. 159

CROSS EXAMINATION BY MR. OTTO:

Q. Do you hold any license? A. No, sir.

Q. Operate any boats? A. Yes, I operate quite a few.

Q. I say do you hold any license to operate tugs? A. You mean master's or engineer's—no, sir.

Q. You testified you knew Mr. Flynn, the mate of the tug Fagan? A. Yes.

160 *Gerald A. Fagan. Called by Respondent. Cross.*

Q. How long had you known him? A. From experience—probably about two years.

Q. From business experience, how long? A. The same time. His reputation preceded him.

Q. How long have you had him in your employ? A. I don't know.

Q. Approximately? A. The tug came out in August, this happened in September. I don't know whether a month, two or six. We have so many I don't know just where he was.

Q. You have no opinion as to how long Mr. Flynn
161 was in your employ before the date of this accident? A. No.

Q. You are Vice-President and have full charge of the operation? A. Yes—200 men.

Q. But the mate of the tug—you employed him personally? A. No, I think our Superintendent did.

Q. Do you know whether Mr. Flynn was on the tug Dorothy before the Fagan? A. I don't know.

Q. You own the tug Dorothy? A. The Company does.

Q. He was mate of the tug Dorothy? A. I do not recollect.

Q. What license does he hold? A. I don't know,
162 I presume—or he wouldn't be employed.

Q. Do you know how long he was employed by anybody else? A. I think with the New Haven Railroad, as inspector of repairs, for a couple of years.

Q. Do they do any towing on the Canal? A. I don't think so.

Q. Do they do any towing from Troy north? A. I don't know what their operations are.

Q. Do you know whether he was employed at all by Cummings? A. I don't know, but I understand they investigated—

Mr. Lenahan: Did you produce the bill of lading?

Mr. Otto: I have a bill of lading—I don't know what purpose you want it for—I have a copy, I have not the original.

Mr. Lenahan: Do you admit this is a copy like Louis Dreyfus & Company received?

Mr. Otto: I will admit it is a copy and that Louis Dreyfus & Company received a copy.

Mr. Lenahan: I offer the copy of the bill of lading in evidence.

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It is marked Marine Exhibit C.

Mr. Otto: I ask Mr. Lenahan to advise whether it is his contention that Louis Dreyfus & Company, in writing, consented to any modification of the freight booking contract and the charterparty?

Mr. Lenahan: We do.

Mr. Otto: The charterparty is very clear.

The Chairman: The contract provides for the shipment of this grain, and this bill of lading proves the shipment of the grain.

Mr. Otto: No, sir, I can prove the shipment without the bill of lading. There is a clause which has objectionable features, the effect of which is to destroy the effect of the charterparty. The Members of the Committee who arranged the charterparty had in mind that very thing, and they therefore inserted this clause to protect themselves from an ex-parte declaration of rights. The bill of lading is handed to the grain shipper—to an agent of the grain shipper—after the grain has been delivered to the carrier. It has no alternative but to accept it. It has not agreed to it, it has already

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agreed on what the terms of the contract will be—the contract and this charterparty. The bill of lading is a mere receipt for the goods. We can prove the receipt without the bill of lading. My objection to it is that the carrier has put in this bill of lading, in printed form, some self-serving declaration as to its rights, while the effect of which is to say, in spite of this contract, the shipper has no rights. I don't want to have the record in any improper form by allowing it to go in, as it serves no
167 useful purpose.

The Chairman: Did Louis Dreyfus & Company receive this copy of bill of lading—did they take any exception to it?

Mr. Otto: Why, I don't believe they did. I don't think it is necessary. They are protected by a charterparty which says this is the entire contract—"Bills of lading must be issued to conform with this charterparty in every respect"—if it does not conform, the bill of lading has no effect.

The Chairman: I can see no real reason for refusing to let it be used. The Committee thoroughly understands the part the contract
168 will play in this matter.

B. S. OAKLEY is recalled.

REDIRECT EXAMINATION BY MR. LENAHAN:

Q. I show you this paper marked Marine Exhibit C, and ask you if you delivered a copy of that to Louis Dreyfus & Company's agent in Buffalo? A. Yes, I did.

Q. Did they take it? A. I assume so.

Q. They did not give it back to you? A. Never saw it.

RECROSS EXAMINATION BY MR. OTTO:

Q. Mr. Oakley, I notice you just testified you handed that over to Louis Dreyfus & Company's agent in Buffalo. Do you want that to stand? What agent did you deliver it to? A. I cannot recall for certain. 170

REDIRECT EXAMINATION BY MR. LENAHAN:

Q. Is the Abel Forwarding Company your forwarding agents at Buffalo? A. They are.

CAPTAIN E. W. HOLMES, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

BY MR. LENAHAN: 171

Q. What is your business? A. Marine supervisor and salvage adjuster.

Q. How long have you worked as marine supervisor and salvage adjuster—been called out along the New York State Barge Canal and Government Lock at Troy? A. Continuously since 1919. From 1916 to 1919 part of the time.

Q. As a matter of fact, you made a study of this lock wall and lock approach, for purposes of mak-

172 *E. W. Holmes. Called by Respondent. Direct.*

ing a change in order to prevent accidents? A. I have, yes.

Q. At the request of the underwriters? A. I have—and others.

Q. When you arrived at the Government Lock, the barge Edward A. Ryan was totally submerged? A. Not totally, she was decks under.

Q. The accident was all over? A. It was all over, and the barge was sunk in the jaws of the lock.

Q. There was no attempt made to salvage the
173 grain? A. You mean at the time she sank?

Q. When she lay there sunken? A. Not until the various interests got together and decided what to do, and abandoned the grain.

Q. To the United States Adjustor? A. Yes.

Q. And they pumped it overboard. Right.

Q. What was the reason? A. It was not worth anything as salvage, and cost too much to handle it.

Q. You saw this sluiceway we have talked about here, have you not? A. Yes.

Q. Which is shown on Marine Exhibit A? A. Yes, I have seen that.

174 Q. Did you ever have experience in similar sluiceways along at the entrance to locks and between locks on the Barge Canal? A. There is a similar condition existing between Locks 2 and 6, which has been recently altered by the State, but this sluiceway is not a very good evidence of it, these two jags in the wall are—

Q. What was done to correct this danger to navigation, as in the sluiceway?

Mr. Otto: I object to that, let the witness testify.

Q. From your experience on the Canal, this length of time, would you or not say this sluiceway and other notches that appear, are dangerous to navigation? A. They have constituted a danger and caused sinkings.

Q. What has been done at other places on the Canal where the same conditions have existed? A. Protection has been given them between 2 and 5 and 6. The walls have been filled in, and a smooth surface presented to the approach of the boat.

Q. What other methods have you seen used to protect the sluiceway? A. Fenders have been put in and guards put over various places. 176

Q. Does this picture itself indicate anything—danger? A. The lalder and the slot which would be to the south of that sluiceway are two jags in the wall—a boat—catch it, especially a rough-cornered boat or with a rough boat.

Q. Do you know other barges which have had such obstacles as this? A. Yes.

Q. How can you tell it? A. I have seen the boats.

Q. Have you seen the ladders? A. Yes, I have seen the ladders. It has been all bent up half a dozen times.

Q. What is the condition of the corner of the sluiceway? A. The concrete is knocked away in places. 177

CROSS EXAMINATION BY MR. OTTO:

Q. Will you kindly state where this other sluiceway is located? A. It would take as long to go to the east as to go to the west. This flight of locks at Waterford, to the head of the upper flight at the terminal, five locks, between each one of them

178 *E. W. Holmes. Called by Respondent. Cross.*

there are rises, and between Locks 3 and 6 they were about equal—10 feet or so—that is where they have been filled in at the present time.

Q. There were about 10,000 boats that passed through this Government Lock at Troy during the year 1928? A. I don't remember—quite a large number.

Q. Approximately—is that approximately correct? A. I would not say 10,000, as I do not know.

Q. But you might say it ran into thousands of trips being made, though—probably about 60,000
179 boats passed through the Government Lock at Troy since it was constructed? A. Probably have, yes.

Q. Do you know of any other boats that have been sunken in the Troy Lock before this disaster? A. A tug sank there right afterwards.

Q. I am asking if you know of other boats? There have been boats damaged before A. Yes, a Marine Transit fleet had a boat sunk there.

Q. This is the first boat in probably 13 years? A. No, sir.

Q. That was sunk in the lock? A. That was sunk in the lock—I will agree with you on that.

Q. During that time, probably 60,000 boats or so
180 have passed through this lock without accident, without sinking? A. Without sinking, yes.

Q. Not such a dangerous condition, is it? A. No, not such an awful dangerous condition, unless you get a condition which brings it about.

Q. You are not an engineer, are you? A. No.

Q. You have had very little experience, if any, in construction? A. I have had a great deal of experience in construction work.

Q. I believe, Mr. Holmes, you testified you were a salvage adjuster since 1916? A. Yes.

Q. During what period of time were you on construction work? A. Prior to 1916.

Q. Where? A. North Bend, Oregon—not in New York State.

REDIRECT EXAMINATION BY MR. LENAHAN:

Q. You do know, or you did testify, there have been a number of accidents at this notch in the wall? A. Yes.

Q. As a matter of fact, you made the trip with the State Engineers Department as to corrections to be made in the Erie Canal? A. With the State 182
Commission appointed by the Government and the Senate.

Q. One of the things you recommended was the abolishment of this sluiceway?

Mr. Otto: I object to the form of the question.

The Chairman: Do I understand you to say a number of these openings—sluiceways—had been filled up—closed up completely?

The Witness: Yes, sir, not closed completely, but a smooth surface wall has been placed across the face of them. 183

The Chairman: Below the water line?

The Witness: It is brought down very close to the water line so the boats cannot get under them.

The Chairman: They give a protection but do not prevent the water running in.

The Witness: Right.

Mr. Lenahan: We rest.

Mr. Otto: As I said in my opening, the duty falls upon the carrier—we will offer proof

that we delivered the cargo—and that he was unable to deliver through no fault or neglect on our part. I do not believe sufficient evidence has been introduced to negative fault or negligence on its own part. They have attempted by several witnesses to show that this boat struck this sluiceway in the wall. Upon cross examination, I believe that they have admitted that thousands of boats have safely navigated through there without accident. There had been no sinking before this time, although the lock had been in existence for 13 years. I believe the captain of the tug has admitted the conditions of navigation were not unusual. It happened in broad daylight, no current, nothing unusual to account for this boat's striking. Therefore, the reasonable inference to be drawn from it is, there is nothing unusual in the conditions of navigation. There must have been neglect, which allowed this boat to sink, especially where experience over a long period of time has shown that it is not an inherently dangerous place; and furthermore, if it is a dangerous place, it is the duty of the captain of the tug to know it and figure his reckonings accordingly.

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I therefore move for a judgment in the case, the carrier having failed to sustain its burden of proof, in showing its absence of neglect or fault.

Mr. Lenahan: Will you put on the record that you rest?

Mr. Otto: I will when I am ready.

Mr. Lenahan: Are you making a motion for judgment?

Mr. Otto: On your case, yes.

I am asking the Committee, Mr. Chairman then, to award without further testimony of the witnesses you see assembled around here, on the grounds that the carrier having rested its case without sufficiently explaining the cause of the accident in such a way as to negative the facts and reasonable inference of fault or neglect on its part, makes unnecessary the calling of further witnesses. I ask your Committee to rule on that before proceeding with my case.

The Chairman: May I ask if you prefer or 188
decide not to put in any evidence to show neglect on the part of the Canal Company?

Mr. Otto: No, I have a number of witnesses here that I expected to call, but I think that if the Committee felt the carrier's case had not sustained the burden of proof with respect to explaining away the personal fault or neglect, it would save time, but if the Committee has any doubt about that, I will call my witnesses.

The Chairman: I think you had better call your witnesses.

189

MAJOR JOHN D. MYTON, being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as folows:

BY MR. OTTO:

Q. You are in charge of the United States Engineer's office at Albany, New York? A. I am.

Q. Did you serve in the United States War Department? A. Yes.

Q. The Government Lock at Troy falls within your supervision? A. Yes.

Q. You have charge of it? A. Yes.

Q. Do you recall September 25, 1928? A. I do.

Q. As the date the Edward A. Ryan sank in the lock? A. Yes.

Q. Do you recall the water conditions on that day? A. I do, sir.

Q. Were they lower or higher than normal? A. Approximately 2 feet lower than what is the normal stage of the river.

191 Q. How would that affect the current in the approach to the lock? A. The less water going over the dam, the less would be the current in the river, therefore there would be very little, if any, current in the approach to the lock.

Q. Do you keep a record of the velocity of the current? A. No velocity—we keep a record of the height from which we have a fixed table where we verify the discharge.

Q. From your records and your observations, are you able to state whether or not there was any current at the place where the Edward A. Ryan struck? A. That would be very little at that stage of the water.

192 Q. Is it or is it not true that the water at that place is practically dead? A. Practically at that stage of the river, yes.

Q. Do you know whether the records of your department show whether any other vessel sank in this lock prior to this date? A. We have no such records since the lock was put in operation.

Q. When was that done? A. In October, 1915.

Q. Do your records disclose how many boats passed through the lock during the year 1928? A. Yes.

Q. What was the number of boats? A. I couldn't tell exactly for 1928—approximately it would be between 9,000 or 10,000 boats, of all classes.

Q. Can you give us an estimate of the number of boats that passed through the Government Lock from 1915 to 1928? A. Of all classes?

Q. Of all classes. A. Approximately 100,000 to 110,000.

Q. Not one of them sank?

Mr. Lenahan: I object to that. He was not there all this time.

194

Q. You are speaking from personal knowledge and records of your office? A. Yes, from an examination of all the records.

Q. Do you consider that lock at Troy, as well as the approach thereto, a safe place for vessels to navigate—on August 25, 1928? A. I do.

Q. Will you kindly state what engineering school you graduated from? A. Renssalaer, at Troy.

Q. How long have you been in the service of the Government? A. In the service at Troy, since the spring of 1912.

Q. In your opinion, do you consider this sluiceway dangerous. A. There may be a certain element of danger under certain conditions. If there was any strong current there, a sluiceway of the type we have, without the upper guardway, would probably be somewhat of a menace to a boat entering the lock, if the boat happened to get crossways of the entrance. There are two factors which might make this sluiceway dangerous. I might qualify it further by saying that if the current at the time—the stage of the water—would be such as to create a current through that opening, of sufficient vel-

195

196 *John D. Myton. Called by Libellant. Direct.*

ocity to cause any great pressure to force a boat against the water, the water would be so high it would be practically closed—it would be so much closed that a boat, even loaded like the Edward A. Ryan, would strike the top of the wall.

Q. So that outside of the exceptional case, it is your opinion this sluiceway is or is not dangerous? A. I do not consider it as dangerous, no.

Q. The possibility of danger would increase, or be existent, only if there were two factors—the current and the method in which the boats approach the lock? A. Yes.

197 Q. On the date of this accident, was there any current? A. There could be but very little.

Q. So that in your judgment, was the accident caused by any dangerous condition of this sluiceway? A. No, sir.

Q. Or by any effect of any current? A. No, sir.

Mr. Lenahan: I will make a further motion to strike out the testimony, on the ground that the witness has not been qualified to testify as to what would effect a barge like the Edward A. Ryan.

Motion denied.

198 Exception.

Q. I believe, I am not sure, but I believe there has been a little testimony introduced about some ladders. You were listening to the testimony? A. Yes.

Q. Do you consider these ladders dangerous? A. No, sir.

Q. How are they built? A. They are set in—offset in the concrete wall—they do not project be-

yond the concrete, they are entirely behind the face of the concrete.

Q. Have you made any recommendations to the War Department with respect to changing this sluiceway in any way? A. No, sir.

Q. Do you consider there is any necessity for it? A. No, sir.

Mr. Lenahan: I object to the question and move to strike out the answer, it is immaterial what he thinks might be a necessity.

The Chairman: I think the witness is qualified as a man familiar with these matters. I think his testimony is all right. 200

Exception.

The Committee examines the blueprint.

The Witness: I would like to explain the statement made by Captain Holmes: there have been several accidents at the entrance to these locks. They have, in so far as I know, all occurred at the north end of what is known as a bullnose of the north guide wall.

Q. That is about how many feet from there? A. About 217 feet. At certain stages of the river, there is a cross current—an eddy—due to the discharge of the mouth of the Mohawk River. Boats have, during what we call the freshet stage, when more than 4½ to 5 feet of water was going over the dam, sailed into the end of this guide wall. They have broken our lamp off half a dozen times, and a ladder there, which has been smashed a dozen times. 201

Q. At the date of this disaster, the water was how much over the dam? A. 4½ feet.

202 *John D. Myton. Called by Libellant. Direct.*

Q. And that condition you speak of is about when the water conditions are about 4½ feet? A. Some of these accidents have also occurred by some of the boats coming across from the other side and getting into that swirl and endeavoring to turn too close to the dam.

Q. The distance from the bullnose of the upper guide wall to the east end of the lock wall I understand is how much? A. About 92 to 93 feet.

Q. The distance at the front of the locks is about what width? A. About 45 feet.

203 Q. The width at the place where the disaster occurred was about what? A. It may be 46 to 47.

The Chairman: I would like to know as to whether this opening goes all the way down to the bottom of the entrance?

The Witness: That I would not know. I was not on the construction, and offhand would not like to say—I think it does. If it does not, it is the exception. The elevation of that wall is 24 feet above sea level, and our minimum sill is minus 2, and that makes it 26 feet.

The Chairman: What is the draft of water in here at normal stages?

204 The Witness: Our projected depth is 12 feet, but there is in the neighborhood of 14 to 16—that is at the time of the last examination. You can see here we have 16 feet 7 inches, 15 feet 4 inches, 11 feet 6 inches—but that is over on that side.

Mr. Hitchcock: Where is the intake of Ford?

The Witness: This is the Ford Plant here (indicating). This is the opening in the bulkhead where the water passes through into the part there.

Mr. Hitchock: Do they run that all the time?

The Witness: Practically continuously. The time they do not run it is when the water gets so low they have to shut down.

Q. On the date of this accident, could the Ford Plant affect the current any, in view of the height of the water you have already testified to? A. Very little, for this reason: that you draw from the Ford at the power plant in that direction, which is the line of deepest water in the channel. Across here, the water is so shallow, with 2 feet of water going over, you could not shove a canalboat empty down into the dam. You cannot get across even with an ordinary launch, at low stages. If you consider contours, the main draw is right there (indicating on blueprint). 206

Q. That is out of the line of approach as the boats enter the lock? A. That is out of the line of approach as the boats enter the lock.

Q. How much water was going over? A. Thirty-seven hundred or forty, the average for the day.

Q. The normal? A. The normal for a navigation season is about 2½ feet.

Q. Does that create a suction down here, which might tend to pull water through the sluiceway at the low stage? A. No. 207

Q. Your maximum of current on the crest of the dam, which is probably twice what it would be up here for that discharge, including the velocity of approach, would be less than 1½ miles? A. The velocity of water immediately adjacent to the dam or right on the crest, including what is known as

208 *John D. Myton. Called by Libellant. Cross.*

the velocity of approach for the 37 feet of water, would be approximately 1½ mile current, but that is immediately on the crest of the dam.

Q. Would the velocity of the approach to the river be the same as on the crest? A. Not by 50 percent.

Q. So that the pull is 50 percent slower than the crest of the dam? A. At least.

The Chairman: This speed of current you spoke of—is that based on the stage of water?

209 The Witness: Yes, I explained that the discharge of the dam would not be the velocity in here (indicating).

The Chairman: That discharge over the dam, 1½ miles per hour, is with the stage of water that existed that day?

The Witness: Yes.

Q. What would be the velocity further back for that day? A. Where boats navigate, the velocity after you get back to the end of this wall here, would be beyond a point to where you have last changed on account of the approach to the dam. It would be probably 50 percent or a little more

210 than one-half the crest of the dam.

CROSS EXAMINATION BY MR. LENAHAN:

Q. You say three-quarters of a mile, in your judgment? A. Yes.

Q. It is a fact that three-quarters of a mile current, when the tow was coming down, this lock chamber was filled up and the gates were open, is that right? A. Yes.

Q. Therefore, you have three-quarters of a mile current entering into this guide wall between the guide wall down to the lock chamber? A. No, sir.

Q. How much? A. The only current you can have is the small amount that can get through this 10 foot sluiceway. This is dead water (indicating).

Q. Is there a current here? A. Yes.

Q. At what point between the end of that guide wall and this lock chamber does the current stop? A. It is the same as friction breaks. You have velocity here, that has got to expend itself. You have got a certain volume of water that has passed that 212
point. It has got to get out the only place. Therefore, the energy in the water here will have to lose itself, as the place is not large enough.

Q. Then it follows, this sluiceway does not cause a set through there? A. Very slight.

Q. It causes some, is that right? A. Certainly.

Q. The approach to these wickets, in your gates, also causes some disturbance in this water? A. What do you mean by wickets?

Q. The gates you open—the valve—when they are open, this causes a certain motion of water in here? A. Yes, sir.

Q. And a breaking up and backwash? A. No 213
backwash.

Q. When you close them, you get a certain amount of backwash? A. You cannot close them that fast.

Q. Will you tell us what difference the opening of these valves or wickets has in the flow in here? A. It lowers the water temporarily.

Q. Does that increase the current through here too? A. No, it is liable to draw the water from this side of the river into the lock.

214 *John D. Myton. Called by Libellant. Cross.*

Q. At what portion of the lock does the dam stop —what section of the lock? A. I would say 120 feet down from there (indicating).

Q. The dam comes right perpendicular to the lock chain?

Mr. Otto: The witness indicates about 125 feet.

A. I cannot give it to you, as the total lock is 585 feet, and I could tell better by the Ryan. The Ryan was 110 feet long, she was free of these gates and
215 her bow was there (indicating). I would say 125 feet to the center of the dam.

Q. Is it a fact that whatever set of the current is down through here, is always determined on this north wall right as you approach the guide wall? A. The set is this way (indicating).

Q. That is accentuated to some extent at least by Ford damming over the water, is that right? A. Very little.

Q. It is so, is it not? A. Yes.

Q. Besides these facts, this sluiceway tends to have a little effect on barges, or there would not— A. No, I would not say it has an effect on barges
216 or anything less than a rowboat or small launch.

Q. It does cause some effect to draw towards the north guide wall? A. It would be very little.

Q. If any commotion set in here by the operation of your valves, to fill or empty your lock chamber, that might cause a vessel to sheer, might it not? A. I would not say it would cause it to sheer, it would have a draw upon the vessel and should draw it straight forward outside.

Q. You are not very well acquainted with the navigation of a barge? A. I have seen thousands go through.

Q. You never handled one yourself? A. Yes, I have handled a tugboat—helped handle a scow.

Q. You did not tow them? A Yes, I have handled the wheel too.

Q. How much? A. Not much—enough to know what it feels like.

Q. What boat? A. My own—Thayer W. Totten.

Q. You towed in this direction—scows—in and around Albany? A. They were scows, not deep barges—about 10 feet.

Q. You never towed these canal barges? A. Oh, no. 218

Q. Now, as a matter of fact, do you know the condition of that ladder on the approach to this lock chamber—did you see it broken? A. Which ladder?

Q. On that lock wall. A. There are two.

Q. Either one? A. I have seen this one (indicating).

Q. Did you ever see it partially down—broken? A. No, not that I remember.

Q. Did you ever examine it? A. I have been up on this.

Q. Did you ever see it twisted—did you ever renew them? A. I couldn't tell you that.

Q. Did you ever examine your records on that point? 219

Mr. Otto: That is drawing it pretty fine.

Q. Why do you designate that north wall as a guide wall? What is that particular word "guide" used for? A. You can't call it "approach".

Q. Why do you use the word "guide"? A. Because it is a guide—protection for the boats to enter the lock.

Q. It was designated as "guide" so that the barges could get up against the side and rub right along? A. Yes.

Q. But it could not be used for that because you put in those slots into the wall, didn't you? A. It is used continuously for it.

Q. It was used so that when the boats came down they could drop over against this side wall and keep sliding along to get into the lock chamber—that is why you call it a guide wall? A. Not necessarily, they should slide along the wall. It is a guide—in the first place, you have a light on it which is a guide at night, that is giving you an approach into the lock. You have got to draw down here (indicating).

Q. I think, if you will remember, you said it could be used for the barge to rub along, so that if the Fagan, with this barge, let it go over against the wall and let it rub along, she wasn't doing anything out of the ordinary, isn't that right? A. Yes.

Q. And the barge should rub along all right? A. Yes.

Q. And you say she should clear this sluiceway—this ladder and this notch shown further back in this picture "A", is that right? A. Yes.

Q. So that if the captain of the Fagan did let the barge go over against the wall, that is what many other barges do in tow? A. Yes, but not in the shape, as I understand the Fagan went over.

Q. You did not see the Fagan, did you? A. No.

Q. Will you tell us, on this photograph, right where that notch in there is? A. I don't recognize what that one is. That is a recess left there for a buffer beam.

Q. Is there one on it? A. No, sir.

Q. They did not put it in? A. They never put it in.

Q. Do you know how many gallons of water Ford is allowed to draw off the upper dam by the—. A. He is allowed to draw all he can.

Q. Do you know how much he is capable of drawing in a day? A. I understand it is equipped for about 6,500 cubic feet per second.

Q. And the drawing of the water by Ford lowers the depth of the upper Hudson quite considerably? A. At times.

Q. At certain times you have to stop Ford from 224
drawing water? A. Yes.

Q. Your office does not keep any record of the number of barges that have their corners damaged or their irons torn off by hitting this notch in the lock wall? A. Not anything that amounts to anything.

Q. What do you mean—the sinking? A. Oh, no, we have several.

Q. Of what? A. Reports of accidents, knocking against this north guide wall.

Q. What is the nature—I am talking about the bullnose—I am talking about the accidents that come from these jags in the wall—this sluiceway? 225
A. As far as I know there was never any accident like the Ryan.

Q. No serious accident? A. Not that I know of.

Q. The barge Brennan was sunk trying to get into this approach wall—do you remember that case? A. No.

Q. The Alf being damaged in the same manner as the Brennan—do you remember that? A. No.

Mr. Otto: Which was this?

Mr. Lenahan: Getting into this long guide wall here.

226 *John D. Myton. Called by Libellant. Cross.*

Mr. Otto: At what particular point?

Mr. Lenahan: The bullnose.

Q. The Mython sank in this lock? A. Yes.

Q. When? A. October 12, 1928.

Q. The barge Pelham was damaged in this lock, was she not? A. Not that I know of.

Q. No record of the barge Brennan being sunk? A. They may have records of them, but I do not remember.

Q. But you told me you looked up your records —examined your records—you are talking from
227 your records? A. Then I misunderstood you. You will pardon me?

Q. Your testimony is now that you have not looked up your records as to the amount of damage that has been done along this guide wall at the approach entrance to this lock, is that right? A. No, I made no special investigation.

Q. Did you make an investigation of the tug Mython? A. Yes.

Q. Did she strike in the same set and sink in the lock? A. No, sir.

Q. Where did she sink? A. Middle gate.

Q. What did she hit? A. Not anything.

228 Q. She just came in and sank. A. She hung on a fender on a gate, she only had 6 inches freeboard.

Mr. Hitchcock: Were there other boats going through the lock immediately preceding the Ryan? Was it used very actively?

The Witness: Yes.

Mr. Hitchcock: You just closed the gates, filled it up, and the Ryan proceeded?

The Witness: Yes, immediately, the other three boats—the original tow—had passed through just preceding.

REDIRECT EXAMINATION BY MR. OTTO:

Q. Without incident? A. Yes.

Q. The lock was open and ready to receive it? A. Yes.

Q. Mr. Lenahan has just asked a question about the Mython sinking in the lock. I believe it is always important to know the circumstances surrounding. I believe you have already testified in part, but for our benefit, will you kindly state from your opinion, after your investigation, as to the cause? A. From the investigation which I made, the 230
Mython sank, due to the fact that the officer in charge allowed her to slip back and lay abreast of the intermediate gates, rather than against the smooth concrete wall, and as soon as the water was let into the lock, in order to raise to the proper level, his guard caught on the timber guard on the lock, causing him to fill up with water, and he sank.

Q. Only about 6 inches freeboard? A. From information I have received.

Q. In your opinion, is that a safe margin for a boat to navigate with? A. I would not like to testify as to that.

Q. Are any boats permitted to enter the lock 231
while the valves are being operated? A. No, sir.

Q. So that when boats approach the lock, is there any commotion of the water? A. They may approach the lock, yes, sir, before the gates are opened for them, but they are not supposed to get on top of the gate. He awaits the signal. If the signal is thrown for them to come ahead, the lock is prepared for them.

The Chairman: How far back would they stop waiting for that signal?

The Witness: Some of them, in coming down, if they have to stop, stop alongside that side, especially if they tow coming up. The down tow will hang on that side to let the up tow pass.

Q. Would it hit the ladder or sluiceway, or does that condition of striking the ladder or sluiceway exist only where there is some improper handling of the tow, or approaching at an angle?

Mr. Lenahan: Objected to as wholly incompetent and irrelevant, calling for an absolute conclusion, not based on the facts that have been brought out here, and on the further ground that while this witness is undoubtedly a great engineer in construction of locks, he has not been shown as ever having towed three barges or boats. He does not hold any master's license.

Q. In your opinion, were boats, coming into the lock or approaching the lock in a proper fashion—would they hit the sluiceway or the ladder to which your attention has been directed?

Mr. Lenahan: I object to that question, it is too general "boats coming in proper fashion". Can the witness understand what he means—"a proper fashion"?

Objection sustained.

Q. Something has been said about the Ford Plant. I believe you have testified a great deal about that. Will you again state whether or not the Ford Plant operated on this particular day, in the light of the water conditions to which you have already

testified, and that with reasonable probability have caused this disaster?

Mr. Lenahan: Objected to on the same grounds. It is only asking the question in a different way.

The Chairman: It seems to the Committee that the Major's scope of testimony should apply to the particular thing about which he is qualified to speak.

RECROSS EXAMINATION BY MR. LENAHAN: 236

Q. One other question on the effect of the lock: It is a fact that three barges 100 feet long—110 feet—drawing about 9½ feet of water—when they come down into this chamber here, the displacement in there does set up a little bit more suction, does it not? A. The same as into the lock.

Q. When moving through this confined space, that of itself sets up some backwash? A. To a certain extent, yes.

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JOSEPH J. WHALEN, being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. What is your occupation? A. Lock master—Government Lock at Troy.

Q. You are in charge of the handling of the lock under Mr. Myton's supervision? A. Yes.

238 *Joseph J. Whalen. Called by Libellant. Direct.*

Q. Do you recall September 25, 1928? A. I do.

Q. Did you see the tug Fagan with the three barges approaching the lock on that day? A. Yes, sir, I saw them out of the towerhouse window—they were coming down the river.

Q. Could you tell whether the tow was proceeding slowly or fast? A. I would not say it was going fast.

Q. Can you state whether it was fast or slow? A. No, I could not from the distance—towerhouse to the end of that guide wall is only 700 feet—600 or 700 feet.

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Q. I appreciate you could not tell the speed of the boat from where you saw it, but could you tell from your observation whether it was going faster than usual, or slower than usual? A. Some come in pretty fast, some come in slow.

Q. What is your judgment on that point in this particular case? A. I think he was hooking them pretty slow—not going full speed.

Q. How did the tug approach the jaws of the lock—did it approach parallel or at any angle? A. At an angle when I saw it.

Q. The angle was in which direction? A. From where I seen the conditions when I looked out, and

240

saw them first, the Ryan boat was in the lead, he was rubbing the north guide wall with the starboard side.

Q. Can you indicate on the map or picture where the barge Ryan first struck the guide wall? A. From the report the lockman gave me—I take his report—it struck about 18 to 20 feet above that.

Mr. Lenahan: I object to that. It is hearsay testimony.

Q. This report was received by you in the performance of your duty? A. Yes.

The Chairman: Is that the customary way?

The Witness: Yes. The lockman makes a report to me, and I make out a report, as lock master, and turn it into Mr. Myton—my superior.

Q. What is the name of that gentleman who made the report? A. O'Neill—he was on the west wall, operating on the west wall at the time.

242 Q. From the report as I get it—your testimony is that from the report of Mr. O'Neill, one of the subordinates, the Ryan first struck about 18 or 20 feet north of a place indicated on this picture by the cross and "A"? A. Yes, sir, and they glided down the wall until it hit there.

Q. By "glided", do you mean dragging? A. Yes.

Q. What did you do after you saw the tow approach—did you leave the towerhouse and come down? A. I went down and got on board the boat and tried to help the captain pull the tarpaulins down over the bow—the water came in so fast we had to get off.

243 Q. On the day of this disaster, September 25, 1928, was the water lower or higher than normal? A. Lower.

Q. About how much? A. I should judge pretty close to 2 feet.

Q. And at the place of the distaster, was there any current? A. I would not call it a current, no.

Q. About what time did this barge strike? A. Around 5 o'clock in the afternoon—daylight saving.

Q. Broad daylight? A. Yes.

Q. Were the weather conditions good or bad?

244 *Joseph J. Whalen. Called by Libellant. Direct.*

Mr. Lenahan: There is no dispute on that. The captain said they were good.

Q. You have been a licensed master at this lock for how many years? A. Nine years last August.

Q. In the course of your duties, you have seen tows approach the lock—enter it? A. Yes.

Q. Can you state what in your opinion is the proper method of approaching the lock, of a tug and its tow, on the date of disaster, with reference to the walls indicated on this map—what course?

245 Mr. Lenahan: I object to that.

Question repeated.

The Chairman: Just what are your duties there outside of the actual care of the locks?

The Witness: I take care of time and generally supervise the operation of the lock.

Q. Do you consider yourself a competent judge of how to bring boats in and take them out? A. I do not want to throw bouquets, but I have seen them—I have been there since the lock was built. I worked on the construction of the lock and the dam. Lots of times we could tell some of the cap-
246 tains how they ought to come in, sometimes it is best not to tell them.

The objection to the question is sustained.

Q. When the barge Ryan first struck, was she parallel with the wall, or was she at an angle to it? A. From my observation, she was at an angle —she hit the starboard bow.

Q. How much of an angle? A. I would put it about 50 degrees.

The Chairman: You had gone down from the towerhouse to the top of the wall at the time the boat struck?

The Witness: No, sir, that was after, when it was in the lock. When it was taking water I came down.

The Chairman: Then your estimation of that angle is from this tower?

The Witness: Yes.

Q. You have heard this testimony of Major Myton, with respect to the number of vessels going through this lock during 1928 and from the time it was constructed? You have been working there since its construction? A. Yes. 248

Q. You have had charge of the records under Mr. Myton's supervision? A. I became lock master. I was left there, after we finished there, to look after the machinery—I operated it. Then when the lock master retired in August, 1920, I was appointed in his place. I was kind of an assistant lock master, assisting, before that—acting.

Q. Do you know of any other boat having been sunk in this lock before the Ryan? A. Never saw any.

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CROSS EXAMINATION BY MR. LENAHAN:

Q. Mr. Whalen, I thought I understood you to say you did not see the boat hit—you did not know what point she hit, but you got that from the report of your lock tender? A. Yes.

Q. If you did not see her hit, how could you tell us at what angle—you just told us she hit at an angle of 60 degrees, yet you say— A. I saw her coming in the entrance of the lock at that angle.

250 *Joseph J. Whalen. Called by Libellant. Cross.*

Q. Was the whole tow at an angle of 60 degrees? A. No, the first boat.

Q. Did you continue to watch her? A. Yes.

Q. How was it you did not see her hit if you continued to watch her? You say you saw her approach the wall—you say you continued to watch. Now, you did not see her hit? A. I did not see her hit, I couldn't see it hit, as I could not see the face of the wall from where I was.

Q. You mean you did not actually see the point on the wall where the barge struck, but you did keep the barge in view all the time? Is that what

251 you mean? A. Yes.

Q. Did you have some concern, when you saw a barge coming in there at a 60 degree angle? A. Yes.

Q. Did you run out or anything? A. Yes.

Q. After she hit? A. Yes.

Q. But you say, from the time she entered this lock chamber, 225 feet from this point where she hit, she came right in at a 60 degree angle? A. She came into the entrance of the lock at that angle.

Q. She did get to the entrance of the lock—what do you call the entrance to the lock? A. I call it 20 feet above our gates—25 feet.

252 Q. You mean after she hit, she was at a 60 degree angle—you do not mean she came in there by the bullnose at a 60 degree angle and hit the wall at that 60 degree angle—you do not mean that, do you? A. Yes.

Q. Now, you say she was at a 60 degree angle when she got to the entrance, and you consider the entrance of the lock to the guide wall 225 feet—do you want us to understand, from the time she got by the bullnose or the north end of the guide wall, she came down 225 feet to a 60 degree angle?

A. No, she hit the guide wall, from what I understand, it was given to me.

Q. I want to know what you saw as distinguished from what somebody told you. Did you see her at the time she came by the bullnose? A. I saw her from the window.

Q. Was she at a 60 degree angle then? A. Yes.

Q. Then you continued to watch her, and for a distance of approximately 225 feet this boat kept being towed at a 60 degree angle, is that right? A. Yes.

Q. Were you looking through a closed window, 254
or open? A. Closed.

Q. Ordinary window-panes? A. Yes.

Q. What are you wearing glasses for—nearsighted or farsighted? A. I don't know, I get them fitted and they fit.

Q. Anyhow, you watched this tow—then she hit. You put it at a point, as I remember, about 20 feet to the north of the sluiceway, is that right? A. Yes.

Q. She went up against the wall? A. She followed down in that position.

Q. Then she went along until she fetched up on something? A. Fetched up on that corner of the recess, from what I understand she did, but I cannot swear to it. 255

Q. You don't know? A. No.

Q. Rubbing along that wall isn't anything out of the ordinary, is it? A. No.

Q. Plenty of tows come in there at an angle,—as a matter of fact, they all come in at a slight angle? A. They would have to, if the wate was running, that is the only way they have to come in.

256 Q. There is nothing out of the ordinary in letting a tow rub along the guide wall? A. No.

Q. As a matter of fact, it is well to have them over against the wall, in case anything happens in the locks, so the men can get out—that is partly the reason why the guide wall is there too? A. Yes.

Q. When the boat struck the wall and started to rub along it, that did not strike you as anything out of the ordinary, did it? A. No.

Q. You were very much surprised when she suddenly stopped, and found out she was sinking? A. Yes.

257 Q. Because you did not expect that? A. No.

Q. Then you and the captain got a canvas and you got onto the bow of the Ryan? A. The captain already had the canvas. I went to assist him.

Q. You got on the bow and put it down over the starboard bow, is that right? A. Yes.

Q. And you thought that the suction of the water, going into the boat, would hold the canvas in there until other means could be had? A. Yes.

Q. But there was no effect of the canvas which you put in? A. No.

Q. Not at all? A. No.

Q. Now that recess—that does not protrude out
258 at the bottom, does it? A. Not any further out into the lock chamber in the approach than the top.

Q. You say there is a recess there. That runs down to the bottom of the concrete wall, I presume, doesn't it? A. Yes.

Q. What do you call the recess, by the way? A. It is a recess we use to catch the driftwood that gets in there—to shove it out.

Q. Does timber get caught in there—logs? A. We get a lot of drift stuff. In order to get rid of

that, we use that to push it out and not get over the dam.

Q. Despite that fact, sometimes logs get crossed and jammed? A. At high water, yes, in a freshet.

Q. In a freshet you get more driftwood—it is just as likely some floating logs would get caught in there under normal conditions, more so than under the freshet conditions? A. No.

Q. In freshet conditions it would be so great it would carry it through? A. The water is so high above the elevation—it is above the roof of that—that is what holds them, but in normal conditions 260
it is always free.

Q. Now, the edge of this sluiceway, of course, that is part of the wall and runs down to the bottom of the river? A. I do not believe it does.

Q. What does it do? A. I do not believe it goes over 20 feet—it might go 10 feet—as when they started to build that it was an after consideration.

Q. So that you think in the face of this guide wall, this sluiceway of approximately 10 feet high—A. 10 feet deep from the water line.

Q. How wide? A. About 9 feet.

Q. Wouldn't it be possible for a half-submerged 261
log to get jammed in there? A. We watch it very close.

Q. How often do you inspect it for that purpose? A. Every day.

Q. Did you inspect it this day? A. No, I did not make an inspection for that day.

Q. If I told you the hole in this barge was about 6½ to 8 feet from the top to the bottom—understand—and you say the top there was no damage there—yet this corner of the sluiceway is absolutely

262 *Joseph J. Whalen. Called by Libellant. Cross.*

perpendicular, and the barge is perpendicular at the side, so that when she hit, the whole side of the barge would hit for at least 10 feet, shouldn't it? A. It should, yes.

Q. If I told you the testimony is that there was a hole punched in this barge below the water line, some 6 or 7 feet, would that indicate there must have been something stuck in the sluiceway and protruded out into the stream at that time?

The Chairman: I think it is proper for the witness to testify as to the position of the barge
263 and the straight edge of the sluiceway.

Mr. Lenahan: I will withdraw the question, it is an inference you can take.

Q. Did you see any floating timber after the boat sank? A. We picked up one plank of that boat. It was floating around afterward, all the hatches were floating around.

Q. I mean the one timber you picked up was broken, wasn't it? A. Yes.

Q. That timber you picked up afterwards, when you looked at the boat, because you had to jump on the boat, starboard side, didn't you? A. I got on
264 the stern and went down toward the bow.

Q. Then looked over the bow? A. Yes.

Q. At the water line or as far down as you could see in the water—you could see a couple of feet, couldn't you? A. She was about a foot when I got on.

Q. As far as you could see down or feel with a pole, you couldn't feel any hole? A. I did not feel down there. I cannot see under water very well.

REDIRECT EXAMINATION BY MR. OTTO:

Q. You saw a plank after the disaster? A. They claim it was a plank.

Q. Would you judge the plank may have come from the Ryan? A. I could not swear to it.

Q. Describe it to us, please? A. It was about 5 feet long and about 3 inches thick, I should judge 6 inches wide. They claim that is where it came out of.

Q. Did you notice whether it was smooth or rough? A. One end was pretty ragged.

266

Q. By ragged, what do you mean? A. Broken.

Q. Any spikes on it? A. Yes, there were spikes on it.

Q. Immediately after the accident, did you make an investigation—ask Mr. O'Neill anything as to how the thing was caused, in the regular course? A. Yes, I had him make out a report.

Q. Did he tell you anything at that time as to the speed of the boats? A. I do not remember.

Adjourned to 2:30 P. M., Thursday, December 12, 1929.

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268 *James Wentworth. Called by Libellant. Direct.*

Met pursuant to adjournment, December 12, 1929.

Present as before.

JAMES WENTWORTH, being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. Were you captain of the barge Edward A.
269 Ryan at the time she sank? A. Yes.

Q. You left with her from Buffalo? A. Yes.

Q. At O'Shaughnessy's Drydock, did any of the boats in tow of the tug Express go aground? A. Yes.

Q. Which boat or boats went aground? A. The John E. Enright.

Q. Was that the only boat? A. That was the only boat.

Q. How many boats were in tow of the Express when she left Buffalo? A. Six.

Q. After the Enright went aground, the tug Express went ahead with three of the six boats? A.
270 Yes.

Q. The tug Gerald A. Fagan picked up the other three, including the Enright—the John E. Enright and the barge Edward A. Ryan? A. Yes.

Q. How were the barges hooked up? A. One behind the other—what we call a tandem.

Q. Which was the head boat? A. The Ryan.

Q. Between the bow of the Ryan and the stern of the tug, how many hawsers were there? A. Two.

Q. Were they long or short. A. Short.

Q. About how many feet? A. My best judgment —40 to 45 feet.

Q. Was there any steering apparatus set up on the barge after it left O'Shaughnessy's in tow of the tug Fagan? A. No, sir.

Q. Could the barge do any steering? A. No, sir.

Q. All the steering had to be done, and the maneuvering had to be done by the Fagan? A. Yes.

Q. Tell us, Mate, what happened after the Fagan hooked up these three boats and left O'Shaughnessy's? Before you answer that question, how far is O'Shaughnessy's from the United States Government Lock at Troy? A. About a mile or a little less. 272

Q. Now, tell us, Mate, if you will, what happened to this tow after leaving O'Shaughnessy's. Were they towed slowly or fast? About what speed were they towed? A. A little bit faster than I could walk —what I call a dog-trot—pretty good speed.

Q. About how fast would you judge? A. About four miles.

Q. An hour? A. An hour.

Q. When did the tug Fagan first slow down? A. After I got inside the wall, I should say, about 80 or 100 feet. 273

Q. Then what happened after the tug slowed down? A. While I stood on the bow, it seemed to sheer slowly around, or suddenly reel, and went over to the pier and hit the pier and dragged down aways, about 60 feet, I should say, something like that.

Q. You say she sheered and hit the north guide wall—is this it (indicating on map)? A. Yes.

Q. After she hit the guide wall, did you say she dragged along? A. Yes.

Q. About how far? A. About 60 feet.

Q. From where? A. She came to the approach wall—I had a fender on when I first hit the wall—she dragged along on that fender until I struck this (indicating), then I lost my fender.

Q. Then the boat struck this recess wall? A. Yes, on the opposite side of this spillway.

Q. The southern end of the sluiceway? A. Yes—spillway.

Q. What were you doing, if anything, after the boat struck the guide wall? What did you say or
275 do? A. After I lost the fender, I jumped over onto the port side of the bow and shouted to them to slacken the port hawser.

Q. Did they slacken that hawser—I mean the tug? A. No, sir.

Q. I hand you a map prepared by the War Department, dated October 18, 1928, and signed "John Myton", and ask you whether this is the condition of the tow after she struck the north guide wall and just before she struck the sluiceway?

Mr. Lenahan: Whom did you say made this?

Mr. Otto: I say prepared by the War Department, signed by Major Myton, who testified.

276 Mr. Lenahan: He said he did not see the tow coming into the lock.

Mr. Otto: I am asking this witness whether he recognizes the tow to be in the condition as described by this map.

A. This is what we call the bullnose (indicating).

Q. Is that the condition of the tow just before she struck the sluiceway? A. It is a good comparison. This is my boat here—I have written (indicating).

Q. Will you indicate on the map where you were standing on the boat?

Witness does as requested.

Q. Did you say or do anything in addition to saying to the tug to slacken the hawser? A. Not until after I hit the spillway.

Q. Is that the position of the tow, just before it struck the sluiceway? A. Yes.

Q. About what time did it strike the sluiceway? A. That I do not know.

278

Q. About what time of the day, Captain? A. It must have been around 5 o'clock—a little after.

Q. After she struck this recess wall, what happened—after you struck the upper guide wall? First, you testify you struck, then you were dragged 50 to 60 feet before you struck the recess wall. During that time, what did you do? A. She apparently seemed to be going right along.

Q. Then what happened after that—did you say anything? A. After she struck the sluiceway?

Q. Yes. What did you say? A. I ran over on my port side and shouted to them to slacken the hawser.

279

Q. Did you say anything about "There she goes" or anything? A. That was after I got into the lock.

Q. The striking of the lock—did that jar you any? A. Yes, it raised the boat up, naturally.

Q. Did it jar you personally any? A. Yes, it jarred me.

Q. Did it break any planks on your boat? A. Before I got away there was a plank flew up almost into my face out of my boat.

Q. You recognized the plank as from your boat? A. Yes.

Q. Was there more than one plank? A. Two.

Q. Were they vertical or horizontal planks? A. Straight up and down planks.

Q. Did the boat take on any water? A. I stepped over and saw the blank raise my booby hatch. I looked into the hatch and saw the water coming in so fast, I dropped the hatch right where it was. Then I rushed to the other side of the boat again. I guess I was jumping up and down—they tell me I was.

Q. You had several children on board? A. I had
281 two daughters on.

Q. How soon after she struck this recess wall did the boat sink? A. I couldn't say how long. She had to run the length of herself after that.

Q. How many minutes? A. Five minutes—three minutes is a long time in such a situation as that.

Q. Did the tugboat pull ahead? A. Yes.

Q. Was she going fast or slow after she struck? A. She slowed up—it slowed up everything when it hit.

Q. After that? A. I brought straight up and came around more into the center of the lock, after she hit.

282 Q. After you got into the lock, the boat sank in the lock, the recess is about 20 feet from the lock? A. About that.

Q. In the picture it shows the Ryan in the lock sunken. Is that about the position as you recall it when she sank? A. Yes.

Q. After you got in, immediately after the accident, did the deckhand say anything to you about not slackening the hawser? A. Not until I asked him.

Q. What did he say? A. He said he could not until he had orders to do so from the captain.

Q. How was this boat loaded, Captain? A. She was loaded 4 inches by the stern—9 feet 8 inches ahead, 10 feet 3 inches astern—4 inches.

Q. So that it would be loaded more astern—about 15 inches more astern than in the bow?

The Chairman: Is that the customary way?

The Witness: Yes.

Q. In approaching this lock, were you going faster in approaching the lock—after you approached the approach, did the tug slow before or after you expected it to slow down? 284

Mr. Lenahan: I object to the form of the question.

Mr. Otto: He already answered that. He said it already slowed down after the tug got in 80 to 90 feet beyond the bullnose. I asked whether the tug slowed down sooner or later than he expected, inside.

Q. You just testified that the tug did not slow down until you came about 80 to 100 feet inside of the upper guide wall, as measured from the bullnose, in. Was that the customary place for a boat 285 to slow down? A. I do not know that, that is up to the tug captain—you use your own judgment on that; different times comes down different. Your tug fetches you down in different ways.

Q. Is this customary, as described on the map and as testified, the line-up of the tow after she struck the wall and just before she struck the recess wall—is that the customary way for a tow to come into a lock? A. Oh, no, sir.

286 *James Wentworth. Called by Libellant, Cross.*

CROSS EXAMINATION BY MR. LENAHAN:

Q. How long have you been on the Erie Canal? A. It was built in 1867, and I never lost a summer in my life.

Q. When your tug got inside the wall, how were you heading? A. Straight as you could run.

Q. Is that the way you expected her to go? A. Sure.

Q. How was your tow made up? A. One behind the other—tandem.

287 Q. How many lines out, Captain? A. Lug line on each side, a pair of cross lines.

Q. The cross lines were for what? A. To hold the boat from slipping sideways. There were tandem fashion and had a timber-hitch.

Q. You say you were coming into the lock straight as a die—did you— A. I did not say approaching the lock.

Q. When you got inside the guide wall, were you going straight? A. For a few minutes—after I got inside 100 feet, no, sir.

Q. What happened after you got inside 100 feet? A. The boat took a sheer—stagger.

288 Q. At the time, was the boat going straight ahead? A. Apparently.

Q. Did she have an equal strain on each one of the hawsers? A. Apparently she did.

Q. The tug was navigating properly, was she? A. Yes, sir.

Q. You had no fault to find with the tug, did you? A. No—at the present time.

Q. What do you mean? A. Just at the time. I had after I struck.

Q. After you struck the sluiceway or spillway, the damage had been done? A. Yes.

Q. In other words, after you struck the spillway, the hole was already in your boat? A. Yes.

Q. What was done after that was just a question of each man's judgment in a dangerous condition? A. The mate of the boat was excited—I will admit that.

Q. I mean slackening the port hawser after your boat had struck and did the damage would not have prevented the boat from sinking? A. No, not after that.

Q. And you did not ask them to slacken the port hawser until after? A. Before. 290

Q. How long before? A. When I was holding the fender dragging along the wall.

Q. Every lock on the Erie Canal is constructed somewhat similar to this Government Lock at Troy, is it not? A. No.

Q. Well, a lock has a long approach wall or guide wall— A. Out West where there are no dangerous locks—

Q. (Continuing) on the State Barge Canal—with construction similar as to the approach or guide wall at Troy? A. Some have about 10 feet bullnose on one side, some have 20 feet.

Q. Captain, I am only asking a fact. At the Government Lock at Troy, they have a number of concrete piers on the east shore of the river, have they not? A. Yes. 291

Q. On the western bank of the river, toward the west, they have an approach wall which is about 225 feet in length, isn't that right? A. Yes.

Q. In the locks on the Erie Canal, they have similar approach walls, do they not? A. Yes.

Q. That is what I asked you, and if you were going into a lock on the Erie Canal—or the Government Lock at Troy—is it anything out of the

292 *James Wentworth. Called by Libellant. Cross.*

ordinary for the head barge or side of the tow to strike the approach wall and rub along? A. No.

Q. You do it every day, don't you? A. Yes.

Q. There was no damage done to your boat when you hit the side of this wall, was there? A. No.

Q. When you hit the side, you expected to rub along as you have on every lock wall, didn't you? A. Yes.

Q. You did not have the slightest idea you were going to fetch up so hard as to stop the headway of the tow, when you hit the spillway? A. No.

293 Q. That was the furthest thing from your mind? As a matter of fact, if you have been on the Barge Canal or through the Government Lock at Troy, since it has been built, your starboard bow was fetched up along the wall and rubbed along the wall—was this the first time? A. The first time.

Q. You have seen it done? A. I have heard of it.

Q. As a matter of fact, if the lock was not ready to take you, you would not rub along the guide wall, so a man could get over on the guide wall and take your lines so you could stop your headway? A. Not on that side.

Q. Did you ever tie up on that side? A. Never.

294 Q. Why not? A. Because they tell you to—put you on the other side.

Q. They put you on the other side when a tow is coming up—they will have the proper way to get out, is that what you mean? A. I don't know.

Q. Now, you say you saw a plank come floating up. Would you state it was a plank out of the bow of your boat—is that right? A. Yes.

Q. You have what they call a stave bow? A. Yes.

Q. How wide do you say the plank is of that stave bow? A. We just put a new bow on that boat in

the spring—10 by 4 plank on each side, has corner nubs.

Q. In other words, the plank ran from the neck of your bow down to the bottom? A. Yes.

Q. The facing of it that showed was about 10 inches wide? A. Yes.

Q. It had a thickness of 4 inches? A. Yes.

Q. Around the top you had irons, did you not? A. Yes.

Q. The plank you saw floating up afterwards—one end was sharp or broken, wasn't it? A. Yes.

Q. The other end was absolutely clean, was it not? A. The one I had on the boat was not. 296

Q. Did they put one on the lock wall? A. I put that on. There were two. I pulled one out and left it there in case I should need it, but I burned it up for wood this summer.

Q. Did you enter the bow of your boat when you were damaged? A. No, sir, I could not get in there.

Q. I mean the bow deck? A. Yes, I was in the bow.

Q. Did you look in—did you see any plank broken on top of the bow? A. You couldn't see, they were under water.

Q. Did you see the boat after she was hauled out on dry dock? A. No, sir. 297

Q. So that you never determined exactly where the hole was on your vessel? A. I knew it was in the bow, by the look of the plank.

Q. You never knew how far from the top or bottom? A. No, I could not tell that, only from an estimate.

Q. How much freeboard was there on your bow—from the top of this bow plank to the water line? A. 9 feet 8 inches ahead.

298 Q. So that you had about 4 feet freeboard? A. Yes.

Q. Did you see any damage on any of that 4 feet? A. Above water?

Q. Above water? A. No, sir.

Q. Not even a mark, as far as you could see? A. No, sir.

Q. Will you tell us just a little more in detail? You state the bow was going straight ahead for the lock—the strain, as far as you could see, was as much on one hawser as another. That continued
299 until you were 100 feet inside the end of the bullnose, is that right? A. Yes.

Q. Up until that time, did you see the other boats behind you? A. I noticed them in looking back.

Q. They were in a straight line? A. Yes.

Q. Everything seemed to be going along fine, as far as going into the lock was concerned? A. Yes.

Q. You stated, when you reached a point 100 feet inside of this bullnose, something happened? A. Yes.

Q. What happened? A. The ship took a slide or sudden sheer and slid over until the wall.

300 Q. Did you see the tug change her course or do anything at that time? A. I did not notice. She seemed apparently to be running straight and enter the lock straight.

Q. As far as you could see, the tug was keeping straight ahead under a slow bell and she did nothing as far as changing her course is concerned, to bring about this sheer that your boat took, is that right? A. Why, she couldn't stop without hooking her up.

Q. When you got that 100 feet inside that wall, the tug was going ahead under a slow bell, is that right? A. Yes.

Q. She was going under a slow bell—she was not hooked up? A. I don't know. I didn't ask how fast she could go.

Q. I didn't ask how fast she could go. You came down from O'Shaughnessy's icehouse, and you told us after she got into the bullnose she slowed down, so that she did not hook up after you saw her slow down? A. Not that I noticed.

Q. And she was going straight for the lock, is that so? A. Your boat is going straight—as I said, after we got into the approach wall 80 feet, that is where I think she slowed down, then took a sheer— 302
went over and—

Q. Did your hawsers sweep out of the water? A. No, sir.

Q. Strain on them all the time? A. Strain on them all the time.

Q. Do you know of any reason why a tug keeping strain on her hawsers, going straight ahead, could cause a sheer on the boat? As long as she has strain and slowed down, it could not cause your boat to sheer? A. The water coming down from the back of the boat will cause the boat to slide.

Q. Is that what cause the boat to sheer? I will ask you a frank question, give me a frank answer 303
—you were on the bow of your boat at that time? A. Yes.

Q. Do you know of anything that this tug did or that any of the barges did—do you know or did you see anything that caused this vessel to take a sheer? A. No, not that I could lay to the tug.

Q. If they did take a sheer, it was some cause outside of the navigation of that tugboat, wasn't it? A. I don't know, I don't know what would cause it.

304 *James Wentworth. Called by Libellant. Redirect.*

Q. If you say you saw nothing you could lay to the tug, the same, vice versa—

Mr. Otto: I object to the question.

Mr. Lenahan: I will withdraw the question.

REDIRECT EXAMINATION BY MR. OTTO:

Q. You came here under a subpoena of the United States District Court? A. Yes.

Q. I understand your testimony to be that the sheer only occurred after the tug suddenly slowed
305 down?

Mr. Lenahan: I object to that question as absolutely leading. The witness said nothing about the tug's slowing down.

Mr. Lenahan: Did the sheer occur shortly after or immediately after the tug slowed down, Captain?

A. Yes.

Q. I believe that Mr. Lenahan asked you something about boats going in along the wall, whether they did any damage. If boats come alongside of
306 walls, parallel with walls, then there is no danger to the boats as a result of coming alongside—rubbing alongside—but as I understand your testimony to be, this boat came at an angle to the wall and struck the wall? A. That is correct.

Q. That is not the customary manner of approaching a lock? A. No.

Q. So that the boats may be damaged in this manner, but if they come along parallel with the upper guide wall or the lock wall, they would not have sustained damage? A. No.

Mr. Lenahan: I don't want to presuppose, but there is very little evidential value, if you put your own witness on and either ask or tell him the history of facts and ask him to say yes or no.

Mr. Otto: Now that you say he is my witness I have called. You suggested him—he is a member of the boat crew, and the boat was chartered or operated by your client. Therefore, I do not think your remark has very much weight.

308

Q. Will you explain, Captain, how this water came into the boat after you struck the recess wall? A. It came in through the hole.

Q. Did you look down the booby hatch? A. Yes.

Q. Did you see water pouring in? A. Yes.

Q. About how many minutes did you have to look at the boat before she went down? A. About 40 minutes.

Q. Between the time she struck the recess and the time she sank? A. Yes.

Mr. Lenahan: Did the captain of the tug come over on your boat?

The Witness: No, sir.

309

Q. Then the captain of the tug and Mr. Whalen came on your boat? A. No, sir.

Q. Did they try to put a canvas down on your boat? A. No, sir.

Q. Do you recognize Mr. Whalen? A. Yes.

Q. You did not see him on your boat trying to put a canvas down? A. Yes.

310 *John Hildebrandt. Called by Respondent. Direct.*

Mr. Otto: Will you stand up, please, Mr. McGowan?

Mr. McGowan does as requested.

Q. Did you see Captain McGowan? You mean to say you do not recognize him? A. No, sir; he was not on it.

JOHN HILDEBRANDT, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

311

BY MR. LENAHAN:

Q. What business are you in? A. Shipwright and drydock business.

Q. How long have you been in the drydock business? A. Fifty years.

Q. Where is your plant located? A. South Roundout, New York.

Q. Opposite Kingston? A. Yes.

Q. Do you recall the barge Edward A. Ryan being at that drydock? A. Yes.

312 Q. Do you recall now where the barge Ryan was sunk? A. Damaged?

Q. Yes. A. Yes.

Q. Where was she damaged? A. On the starboard side.

Q. Did you go to Troy or vicinity to examine the barge Ryan? A. Yes.

Q. You were informed of where she sank—at the Government Lock in Troy? A. Yes, she was not there when I took her out.

Q. Where did you first see her? A. Lumber District.

Q. Did they bring her down to your drydock? A. Yes.

Q. Did you haul her out on drydock? A. Yes.

Q. Where was the hole in the barge? A. Starboard side forward.

Q. How far from the bottom of the barge? A. About a foot and a half.

Q. How far did the hole extend? A. I should judge about possibly 2 feet crushed in.

Q. Was there any broken plank on the bow besides those planks? A. No, not that I recollect.

Q. Did you repair the barge? A. Yes. 314

CROSS EXAMINATION BY MR. OTTO:

Q. You heard the witnesses that preceded you, didn't you? A. Yes.

Q. They said the boat was loaded 9 feet 8 inches forward, 10 feet 3 inches aft? A. Yes.

Q. What kind of bow? A. Stave bow.

Q. Straight up and down? A. Yes.

Q. It does not bulge at the bottom or top? A. No, sir.

Q. The planks are vertical? A. Yes.

Q. Will you tell us, when a boat loaded aft, as this one was, comes in contact with a flat straight 315 vertical surface, or such as you might find on the corner of a recess, what part of that boat will hit first? A. You mean if going head on?

Q. Yes. A. She will strike with her bow.

Q. What part of her bow? A. It all depends on circumstances—what angle she is at when approaching the spot she is going to hit.

Q. I told you she was trimmed 10 feet 3 inches aft. A. Yes, but she might have been coming in

against that surface on an angle, or going straight ahead.

Q. The boat was trimmed aft, the bottom part of the bow is the foremost part of the bow, isn't it, when travelling through the surface of the water? A. Yes.

Q. So that when it comes in contact with any flat surface, perpendicular, vertical, head on, the first part of that barge to hit is the bottom part of the bow, isn't it? A. I don't know about that, I would not know. I would want to see the surface it struck.

317

Q. What color of paint did this bow have on when you hauled it out? A. I think it was painted lead—drab.

Q. Sort of slate? A. Yes. I would not be sure —it runs in my mind she was.

Q. When did you go up and look at the boat—when on the Canal? A. I did not see her in the Canal.

Q. You saw her in Albany? A. At the Lumber District.

Q. What was her condition then? A. She was in a sanken condition, her stern was about under water—water on her deck almost as far as amid-

318 ships, and her bow was sticking up.

Q. How much of her bow stuck out of the water? A. At low water I think about 6 feet.

Q. This boat has 14 feet sides—about 8 feet under water when you saw her at low tide? A. Yes.

Q. When did you see her—the date? A. I cannot tell.

Q. About? A. I would not want to say.

Q. Sometime last summer? A. You mean the early summer of 1928?

Q. 1929. Do you know when she fetched up? A. I do not know anything about that at all.

Q. Was she in a body of water that freezes all winter? A. I don't know where she was during the winter.

Q. Did she have any indication of having been pressed apart, either by having grain left in her or ice outside of her? A. Yes, she did.

Q. Then in the condition you saw her, the boat was not in the same condition as she had been immediately after it hit the sluiceway? A. That I could not tell you.

320

Q. When did you take her down to your yard? A. I think in June, I am not just sure—somewhere about that time.

Q. How many days, months, after you saw her in Albany, did you take her down to your yard? A. Possibly a week.

Q. Do you know the date you sent her out of drydock? A. I do not.

Q. Do you keep records at your plant? A. At our plant.

Q. Did you have any occasion to know what you were coming here today for? A. No, I did not—just called me to come, by wire, I was asked to appear here, I did not prepare myself with any records.

321

Q. Isn't it rather an important matter to know when and how long a boat is in drydock in the orinary course of business? A. I would not think so. Sometimes you dock a boat and take a long time, and sometimes you—

Q. When a boat hits a sluiceway and is sunk for a period of one winter, would you assume that was to be a slight or serious job? A. It all depends on the condition of the boat.

Q. Didn't you have an opportunity to see the condition of the boat when in Albany? A. Yes, I did.

Q. You went up there for that purpose? A. Yes.

Q. You knew what kind of job you were getting? A. On top I did, I didn't know on the bottom.

Q. With whom did you discuss the matter when you went up to Albany? A. I don't know whether I discussed it with anyone.

Q. You didn't go up of your own volition, did you? A. I went up there representing a man who
323 bought the boat, and went there to get her out for him.

Q. The man bought the boat while under the water, while in the condition he saw her? A. As far as I know, he did.

Q. He bought a cat-in-the-bag, didn't he? A. I presume he did.

Q. You say you came down here today on an invitation—whose was that—whose invitation? A. Why, Mr. Lenahan asked me to come here.

Q. Did you discuss the matter with him? A. No, I did not. I did not see him until I came on here. I was over to Jersey City at Court.

Q. Have you discussed the matter with Mr. Len-
324 ahan? A. No, sir.

Q. You have with other people, is that right? A. No, sir; I have not.

Q. Will you try, as closely as you can, to fix the date the boat was actually hauled out of drydock? A. It would be nonsense for me to answer, for I cannot tell you anywhere near the time.

Q. You say you examined it in June? A. I wouldn't be sure, I think some time in June.

Q. Then it was hauled out of your drydock in June, some time probably? A. It might have been.

Q. June, 1929? A. Yes.

David F. Pickett. Called by Libellant. Direct. 325

DAVID F. PICKETT, being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. What is your occupation? A. My title is lock man.

Q. By whom are you employed? A. The United States Government.

Q. How long were you employed as lock man? A. As lock tender and machinery tender, eleven years. 326

Q. You are stationed at Troy, New York—United States Government Lock there? A. Yes.

Q. Do you remember the sinking of the barge Edward A. Ryan? A. I do.

Q. September 25, 1928? A. I would not say anything as to the date, I cannot remember the exact date.

Q. On that date, were you handling the valves to open the gate to the lock? A. Yes.

Q. Was the gate open before the tug Fagan, with its three barges, approached it? A. Yes.

Q. When did you first see the tug Fagan and the barges? Where was the tow when you first saw it, 327 and where were you? A. The tow was up the river, this side of O'Shaughnessy's, when I saw it.

Q. After the gate of the lock was open, did you see the boats in the formation as described on that map (indicating Dreyfus' Exhibit A-1)? A. Yes.

Q. Where were you standing when you saw it? A. At the extreme end of the wall.

Mr. Otto: The place where the witness was standing when he saw the boats in this forma-

tion (indicating on map) are marked by the witness "X" and "A".

Q. Is this the position of the boats when you first saw them after seeing the fleet a considerable distance away? A. Yes, this is the shape they were in.

Q. Was the head barge, the Ryan, scraping the guide wall at that time? A. When I saw it, yes.

Q. About how far did she scrape the wall before she struck? A. My opinion is she was scraping about 30 feet.

329 Q. Did you see it scraping? A. I saw it scraping this west wall.

Q. Did you see anybody on board the barge Ryan? A. Yes, the captain.

Q. Where was he standing? A. On the bow.

Q. Will you make a cross there?

Witness indicates on the map "X" and "B".

Q. Did you hear the captain say anything? A. I heard him shouting—I couldn't make out what he was saying.

Q. How was he shouting? A. He was considerably excited, he was yelling at the top of his voice 330 —something I did not get—but when she hit I remember him saying "There she goes", then he hollered to the people on the boat to clean out the cabin, get all their personal effects out.

Q. When you saw this fleet first—that means after they got within the approach to the lock—you saw them, I think, some distance away, but you saw them in this position when they came within the approach to the lock? A. Yes.

Q. Did you hear anything on the tug at all, about the time you saw the boats in this position? A. Yes, I heard the jingle of the bell.

Q. How far away, approximately, were you from the tug? A. Probably 20 feet.

Q. So that from this point to the tug—about 20 feet—the distance from this point "C and D" on the map is about how many feet? A. About 45 feet —44—46.

Q. After you heard this bargeman making some noise, yelling to the tug, and after you heard the jingle on the tug, did you hear or could you see anything else? A. Yes; I heard the lockman. He gave instructions to go and get some manure, and we ran away from there.

Q. That was afterward—after you saw the boats in this position and after you heard the bargeman yelling to the tug—what he was yelling you couldn't understand—then you heard a jingle on the tug—did you see and hear the barge strike anything? A. Yes.

Q. What did it strike? A. It struck the corner of this recess.

Q. You saw [redacted]? A. Yes.

Q. Did you notice the boat taking on any water immediately? A. Yes.

Q. Did you notice whether the barge had any steering apparatus set up for steering? A. There was none set—the cables were not set.

Q. What kind of a day was it? A. Beautiful.

Q. What was the visibility? A. Sultry and clear.

Q. Broad daylight? A. Broad daylight.

Q. You have been lockman for the past eleven years? A. I have not had that title, but I am working on the Troy lock for eleven years.

Q. You have been lockman for how many years? A. Five years.

Q. During the immediate past years, during that time, have you seen any tug with a tow of three barges or more, approach the lock in the manner as described on this map? A. Not to my knowledge, I have not seen anything like that at all—only this particular fleet.

Q. Does this map describe the conditions of the lock and the position of the boats as you knew them to be? A. Yes.

Q. As prepared by the War Department, so far as you know? A. Yes.

Q. Since you have been at the lock, have you seen or heard of any vessels striking that recess wall before this? A. A glancing blow, yes, the tow strike the wall.

Q. Any damage to the boat? A. Not until now.

Q. Never heard of a sinking in this lock? A. No, this is the first one.

Q. If the barges approach the lock parallel to this guide wall, instead of at an angle, would they sustain any damage by just scraping along the side of the wall? A. I don't see how they could. They had fenders on them. They generally glide along the guide wall.

Q. One of your duties is to open and close the locks? A. Yes.

Q. You handle the valve which is located at this place? A. Yes (indicating "E" on the map).

Q. Can you state whether or not there was any driftwood in the recess wall on the date of this accident? A. There was no driftwood.

Q. If there were, would you have known it? A. We would have to get it out before we could open the gates. Any driftwood behind the gates we had

to get out and have the river clear in order to swing the gates back into the recess.

The Chairman: You use the word "recess". We have been using the word "recess" for this (indicating). This recess, you say, is where the boats clip so they would be flush?

The Witness: Even with the wall. We call this a recess—it is a sluiceway. We push all our rubbish out through here.

The Chairman: I think it would be well if we could remember to call that "sluiceway", as 338
"recess" to me is not necessarily an opening, so for the record call it "sluiceway". We understand, now, what you are talking about. If these minutes were read a year from now, there might be confusion.

CROSS EXAMINATION BY MR. LENAHAN:

Q. You say there was no driftwood in the recess, because if there were, the gates could not be open —you could not operate the gates. Now, then, could any driftwood or submerged logs creep into the sluiceway, that had nothing to do with operating the gates? A. Certainly not. 339

Q. Now, you say in answer to another question, that you have seen boats hit this sluiceway before and then go right on—roll over? A. I saw boats hit the north guide wall and glide right along.

Q. Even the corners of the sluiceway? A. Yes, because it is all chipped off.

Q. Many boats have hit it? A. Yes.

Q. You have seen many hit it, glide along and go by? A. Yes.

340 *David F. Pickett. Called by Libellant. Cross.*

Q. You know when they go by too, don't you? A. Yes.

Q. What is the shape of the bows of these boats? A. Different shapes.

Q. The Ryan—the ordinary Barge Canal boat? A. I would not know, couldn't give it to you right, but I should judge it is quarter-round.

Q. On the corners, isn't it? A. Yes, in other words flat across.

Q. The Barge Canal boats have all got a round bow on the corner? A. Not all.

341 Q. What I term the Barge Canal boats—they say these barges, such as the Ryan, the one we are talking about, have what they call a stave bow, which is round on the corners? A. I wouldn't swear as to that.

Q. It is nothing unusual for a barge to rub up against the guide wall—rub along—you have seen it hundreds of times? A. Sure.

Q. When you saw this barge rubbing along the wall, before she came to the sluiceway, you did not think it was anything out of the ordinary? A. Yes, the position she was in.

Q. What was the matter? A. She came in on an angle.

342 Q. How much? A. I don't know.

Q. Isn't it true that the more angle she came in, the more broad surface she would expose to the sluiceway? A. Yes.

Q. If she exposed the broad of the bow—and I am talking about straight across—if she exposed the broad of the bow, she could get in the sluiceway? A. She couldn't get in there, but she was at such an angle that she did.

Q. Did you say this correctly represents the angle or not (indicating map)? A. As far as I can re-

member, that is the angle it came in on—any more than this boat is backed the wrong way—this boat was a little over—angling this way—pulling in behind the boat over there (indicating).

Q. You didn't see the boats when they took a sheer? A. Not until they got within 30 feet.

Q. When you saw them, they were up against the wall? A. Yes, scraping the wall.

Q. You don't know anything about navigation of boats, do you? A. No, sir.

Q. But you do know if they came in on an angle like that, when the starboard bow hit that wall, 344
that would tend to throw the whole tow parallel to the wall, wouldn't it? A. No, it would have a tendency to straighten them up, if it did something like that.

Q. What angle did you say she was coming in on? A. 60 degree angle.

Q. Do you know how long the barge is? A. We have a record up there, I think it is a trifle over 100 feet.

Q. Do you know the distance between the two walls there at the point of that sluiceway? A. I believe it is 44½ feet.

Q. Was her stern hitting the other side of the 345
wall? A. I think it was.

Q. Was Mr. Whalen there before you were there? A. Yes, he sent my partner and myself for manure thinking they could patch it up.

Q. Did you see where Mr. Whalen went? A. We both took it on a run, we had to go three blocks to get the barrel to put the manure in.

Q. You don't know where Mr. Whalen went? A. I don't know.

Q. Did he go down toward the barns? A. I don't know.

346 *David F. Pickett. Called by Libellant. Redirect.*
Captain Crossen, Jr. Called by Libellant. Direct.

REDIRECT EXAMINATION BY MR. OTTO:

Q. When you first say the boats in the position as indicated by the map, was Mr. Whalen there? A. I couldn't tell you, we were all excited.

Mr. Otto: I offer the blueprint in evidence. It is marked Exhibit L D A-1.

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347 CAPTAIN CROSSEN, JR., being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. You are a captain of steamtugs? A. Yes.

Q. What license do you hold? A. New York Harbor and Lower Bay, Hudson River to Yonkers.

Q. You are employed by whom? A. Pennsylvania Railway.

Q. How long have you been acting in the capacity of captain of steamtugs? A. Twenty-five years.

348 Q. During that period, have you had occasion to go in or out of locks? A. Yes.

Q. Government and other State locks? A. State locks.

Q. Will you look at that last chart. Assuming the boats were brought into a lock in that fashion, would you call that proper or improper? A. It is not that I ever navigated this canal or in this lock, but in the position of these boats, they are not coming in proper.

349

Q. Assuming the boats were in that position, rubbing along a lock wall, you are in charge of the tug, such as the Fagan, is it the proper maneuver to send that boat ahead on a so-called jingle? A. I would not do it so near the approach to the lock.

Q. Why wouldn't you? A. Well, if I know the sluiceway was here, I would figure before I could pull clear she would hit it. I would rather stop and back my boat up against the head boat, then back this way, instead of increasing.

Q. If I ask you to assume the boats were approaching the lock at a rate of speed approximating 3 to 4 miles, would you say it was dangerous to go ahead? A. Absolutely.

350

Q. Would you say it was safe towing, whether boats were crooked, straight or otherwise, to the head of the lock? A. It would be absolutely unsafe, so close to a lock, going 3 or 4 miles an hour.

Q. Do you know the tug Fagan? A. No, only by hearsay.

Q. I think there is testimony in the record that the tug is of the capacity of 300 to 335 horsepower. Would you call that a large or small tug, as to her horsepower? A. That is a fair sized tug.

Q. Large tug for the Canal? A. Large tug for the Harbor.

351

Q. Would you say three barges, of the size 22 feet large, 101 feet long and 10 feet 4 inches side, loaded with approximately 400 to 500 tons of cargo, was a heavy or light load for that boat? A. I would consider she would be perfectly able to handle that tow. I would consider it a natural tow for her.

Q. Could she handle them with dexterity? A. Oh, yes, in a fairway she could.

Q. So she could check up with no particular loss of time? A. Absolutely no loss of time, if he wanted to back up.

The Chairman: What is the so-called jingle bell?

The Witness: It means to give all you got.—go ahead full speed.

The Chairman: Is it the duty of a competent tug captain to know the set of the tide and current and the hook-up of the boats that she has in tow, at all times?

353 The Witness: Absolutely, whatever he is towing.

Cross Examination by Mr. Lenahan:

Q. Did you ever see the Government Lock at Troy? A. I have never navigated that, but I have been on other locks through the Raritan.

Q. How much water can you take through the Raritan? A. Seven.

Q. How wide a boat? A. 22.

Q. How big are the locks? A. About 225.

Q. How wide?. A. About 33-24.

354 Q. How long did you tow that Canal? A. I towed five months on the Raritan, but I have been going in and out of these since I was a baby.

Q. How long did you tow? A. Between five and six months.

Q. That is the sum total of your experience in towing in canals? A. Yes. I have towed up to the oulet lock for the last twenty-five years, but I actually towed through the Canal.

Q. As a matter of fact, you are not permitted, under the law, to take a steamboat north of Yonkers, are you? A. That is it.

Q. All the towing you have done, outside of the five months you mentioned, has been in tidal waters, is that right? A. Yes.

Q. You do not attempt to pose as an expert taking vessels into a lock, when you never saw the lock or conditions surrounding it? A. The conditions are better than conditions in the Raritan Canal. You have more room to maneuver.

Q. I asked you a fair question. Would you presume to act as an expert, as to towing in a place that you have never seen or never operated a tugboat? A. Yes. When you ask me about entering a lock anywhere. 356

Q. Anywhere? A. You have got to take the same precaution going into any lock.

Q. Even the Panama Canal? A. Anywhere where you have got to wait for a gate to open.

Q. You said you have towed vessels in State or Government—what Government lock? A. I said the Raritan Lock.

Q. Is that a Government lock? A. It is a State canal.

Q. Are you sure of that? A. Yes, leased to the Pennsylvania Railroad.

Q. What boat are you on now? A. The P. R. R. 32. 357

Q. Where do you operate from? A. From South Amboy and all around the harbor.

Q. How big a tug are you on? A. Horsepower 700.

Q. You said, in answer to a question, that you have seen the tug Gerald A. Fagan? A. Absolutely, different times.

Q. You say a tow of three barges is a fair tow? A. I say the Gerald Fagan ought to handle three barges anywhere, if she is handled properly.

358 *Captain Crossen, Jr. Called by Libellant. Cross.*

Q. And you said something about that you would not give a boat a jingle under certain conditions. What conditions do you refer to? A. In a condition like this, when you have an obstruction a few feet away that you are going to strike, if you cannot straighten them up.

Q. If you were going up the East River with three round-cornered barges in tow, and for some reason or other one of the barges took a sheer, what would you do to break the sheer—would you back up or give a jingle?

359 Mr. Otto: Objected to, as there is no foundation laid for that testimony.

Objection sustained.

Q. If you have three barges coming along straight, and for some reason they take a sheer, the thing to do is to use your own best judgment how to break— A. The best judgment is to keep away from the object far enough so you will not have to.

Q. I said, if you had three barges in tow, and they took a sheer, the better part of judgment or valor would be try to break the sheer? A. That all depends on the circumstances. If you have the
360 room, sometimes by giving this extra jingle or strain, when going into something, you will part that port hawser and away she will go. You are helpless than with one hawser out, while if you pull steady you may pull clear.

Q. Then it all depends on the judgment of the master? A. Absolutely. He can see his distances —how far the object is away.

Q. Yes, if you had the barges in tow and they take a sheer— A. Those barges?

Q. Any barge—they took a sheer and headed for an object, you would act on your own good judgment, whether to give a jingle or stop or what to do? A. If I had these barges in tow in slack water and saw they were going to hit, I would not go to hook up, a few feet away.

Q. I said if you had three barges in tow, and saw them take a sheer for an object, it would depend upon what you thought in that minute would be the best thing to do? A. Certainly, whether safe to hook her up or safe to slow her down—which would be her own job.

362

Q. And the reason you would not hook up is that you would be afraid you would part a hawser? A. Absolutely.

The Chairman: If you were within 20 feet of a gate to a lock that was open, or 200 feet of a gate that was closed, would you consider it good judgment to hook up a tug, going about three miles an hour?

The Witness: Absolutely not.

The Chairman: Why not.

The Witness: You are too close to the lock—too close to the gate.

The Chairman: Liable to go through the gate? 363

The Witness: Yes.

Mr. Otto: Did you ever qualify in any Federal Court as an expert?

Mr. Lenahan: I object to that as incompetent and immaterial.

Mr. Otto: You questioned this man's qualifications.

Mr. Lenahan: I certainly do, for attempting to pose as an expert on some situation he never saw.

The Chairman: It seems to me if he qualified in a Federal Court, it would be on what basis he qualified.

REDIRECT EXAMINATION BY MR. OTTO:

Q. Captain, did Mr. Lenahan ever call you as an expert in a Federal Court case? A. No, but his partner has, and sad to say I had to go against him this morning, and he is one of my best friends.

365 Mr. Lenahan: Did my partner ever call you as an expert on canal navigation?

The Witness: No, sir.

The Chairman: Did they ever call you as an expert on tugboat management and operation?

The Witness: Yes.

Mr. Otto: That is what I called him for. Whether any tugboat in towing barges of that type at a fair clip, and the tug suddenly slowed down, what happens to these barges?

The Witness: The head barge will naturally take a sheer one side or the other.

366 Q. That happens how often? A. Any time you stop, when you have got way on your tow.

Q. If I told you this tug was bringing these barges in a sort of pocket or dead water, would they do that? A. Why certainly, so long as they come in with way on. When the tugboats stop or slow down, that tow has got to go either one way or the other, they will not come directly straight, they sag one side or the other.

Q. Is it necessary that the towing hawser be slack in the water for that condition to exist? A. Certainly.

Q. If you have a set of boats, such as that, along the wall, with the head boat parallel, and the tug is hooked up, will the quickwater or wash from the propeller have any effect on that head boat? A. To a certain extent. If the tug is pulling on one side, the quickwater is hitting that tow and has a tendency to drive her over to the wall.

Q. The faster her hook-up, the faster it would drive into the wall and hold there? A. Yes, and until he could maneuver his boat to get out far enough to port his wheel to pull away from the wall.

368

Mr. Lenahan: Did somebody tell you this was dead water up in this place?

The Witness: No, not exactly dead water.

The Chairman: My recollection is there was very little current that could be referred to.

Mr. Otto: Would that same condition exist, to which there has been an objection, if there was very little current instead of still or dead water, the boat sagging over?

The Witness: Yes, that could exist just the same with a little.

RECROSS EXAMINATION BY MR. LENAHAN: 369

Q. Will you tell us why, with straight corners alike, these barges—and they are all straight in line—if you slowed down and let the strain off, why they will sheer? A. The quickwater from the tug is one thing. These two boats may be shoving the head boat ahead—that will cause it to sheer.

Q. What will shove them? A. They may be carrying better way than the head boat.

370 *Roy Oatman. Called by Libellant. Direct.*

Q. Suppose they are all the same kind of barge? A. I do not know as there are two barges exactly alike.

Q. You don't know that? A. No, but I never heard at all of two boats of any description exactly alike and handled alike.

ROY OATMAN, being duly sworn, and examined as a witness for Louis Dreyfus & Company, testified as follows:

371

BY MR. OTTO:

Q. You are employed as what? A. As captain on steamboats.

Q. What license do you hold? A. Master's for New York Harbor, Long Island Sound, Hudson River, New York State Barge Canal, Buffalo Harbor.

Q. Have you ever been through this Government Lock at Troy? A. Yes.

Q. How often? A. Ten or twelve times every summer.

372 Q. How many summers? A. Since 1919.

Q. Will you look at that chart in front of you, and tell us whether or not that is a proper manner in which to land at the further end of the Government Lock at Troy? A. If it landed outside of the lock it would go into it—it would go into the lock.

Q. Is it proper? A. No, I don't think it is proper.

Q. If I told you the tow was proceeding at a rate of speed between 3 and 4 miles an hour, would that in your opinion make it dangerous? A. Yes, to go into a lock that fast.

Q. Assume, if you will, you were bringing a tow such as that into that lock, in that position, and the starboard side of the head barge started grazing that wall, what if anything would you do? A. Grazing the wall, glide upon it, it is clear you can slide along, if not you have to take some means to pull away or stop the tow.

Q. What means would you take to keep the tow from grazing along the wall, if you knew there was a sluiceway ahead near the gate? A. The port hawser could be slackened; back up against the tow, and stop. You could throw the stern of the tug on the other side of the lock. 374

Q. What speed have you been in the habit of operating locks, and landing along the guide wall? A. Generally about a mile to a mile and a half an hour.

Q. When you get them into the wall, you drift them into the lock? A. Yes.

Q. Although the lock is made ready for you? A. Yes.

CROSS EXAMINATION BY MR. LENAHAN:

Q. Did you ever attempt to bring them in on a jingle? A. That depends. If you see they are going to hit something, you can use a jingle to pull them clear. 375

Q. There is no set rule of bringing barges into a lock, is there? A. No, sir.

Q. You don't know when they are going to take a dive one way or another? A. No.

Q. When they do, you are liable to have to use a jingle? A. Sometimes.

Q. Now, you said in a tow of barges—three barge canal boats, tight, going at a rate of 3½ to

4 miles, if they struck that wall in the manner indicated on this chart, there is liable to be some damage to the bow of that barge? A. It seems likely there would be.

Q. You know well there would be, don't you? A. When you first asked the question, if this is the proper way to bring it in, you asked a question just whether you were going into the lock or land the tow outside—if you are going to land outside, that method is all right.

Q. If you are going to land on the east side—
877 either side? A. No, it would be all right for the east side but not the west side.

Q. What is the difference? A. You are going to land them over here. There would be half—

Q. Is not the current set in this north wall? A. Yes, when the river is running, but I do not know the direction of the river at that time.

Q. It was testified that the current was running ¾ of a mile an hour. Would not that set them right over there? A. It would have a tendency to set them over a little, yes.

Q. You scraped along these lock walls where ther have been sluiceways, haven't you? A. Yes.

878 Q. Did you operate barges with round bow corners? A. I have towed barges like that.

Q. You let them rub along the wall? A. Yes.

Q. By sluiceways? A. Why, they rub, yes.

Q. They rub by the sluiceway, don't they? A. Yes.

Q. The round corners go right by? A. If not at too much of an angle that they got.

Q. If there is too much, can they get in? A. They can hit the corner.

Q. What corner? A. The bow corner.

Q. Haven't they room? A. They can hit a sluiceway though.

Q. I am asking you if you never put the starboard bow or port bow of this forward barge, with round corners, up against a guide wall or approach wall and let them run along and let them slide by the sluiceway? A. Yes.

The Chairman: Have you ever attempted to slide a boat along the wall at a 60 degree angle, with sluiceways?

The Witness: No, not where there was a sluiceway. 380

REDIRECT EXAMINATION BY MR. OTTO:

Q. You say there is no set rule as to landing a tow on a guide wall—is it not the rule to land them in the safest possible manner? A. Yes..

Q. Does a rate of speed in excess of that which you testified to before, indicate in your opinion a safe manner? A. No, I don't think it would be.

Q. In landing at an angle, or permitting them to scrape some 30 to 50 feet at an angle—is that in your opinion safe? A. No.

Q. When a tug is towing barges of this kind at 381
any speed, and the tug suddenly slows up, what happens to the tow with respect to sagging? A. They generally take a sheer one way or the other.

Q. That is quite common? A. Yes.

Q. As a matter of fact, a competent captain or pilot expects it when he slows up, doesn't he? A. Yes.

Q. If I told you the water on that level was 2 feet below normal, would that in your opinion indicate any current which might affect in any way the

382 *Roy Oatman. Called by Libellant. Recross.*

navigation of a tug and tow? A. If it were 2 feet below normal, I do not think there would be current enough there to bother any.

Q. Would a 10-foot sluiceway in any way affect the condition of the water between the bullnose and the pier in this Troy lock, as you know it? A. No, I do not think it would.

RECROSS EXAMINATION BY MR. LENAHAN:

Q. Do you mean to say, if you have your tug hooked up, and ringing down one bell, to put her under a slow bell, your tow takes a sheer? A. Most
383 generally, yes.

Q. When you go from slow to high, or high to slow—or are you talking about when— A. No, when they hook up from slow.

Q. Why? A. I don't know, but they generally do, sometimes not.

Q. How long have you been watching them do this? A. I have noticed it happen ever since I have been on the steamboats.

Q. If you are going at your ordinary normal full speed ahead, you are straining on your hawsers? A. Yes.

Q. If you slow your tug down, you don't take the
384 strain off, if you have them on two short hawsers? A. You don't take it all off.

Q. You still have a strain? A. Yes.

Q. Why should they sheer? A. I don't know.

Q. But they do sheer? A. Yes.

Q. Even when the sawsers are not slackened any? A. They do not necessarily have to slacken into the water to make them sheer.

The blueprint map is marked Exhibit A R C.

Mr. Otto: I rest.

Mr. Lenahan: Well, we have more evidence, but it's only custom, and so we will rest, too. I am willing to sum up now.

Mr. Lenahan: The charge here, it develops now, you want to bear in mind the Marine Transit Corporation is a private carrier. It does not hold itself out as a public carrier, and you should not hold us to that degree of care to which you hold a railroad company, and I presume you gentlemen are probably just as well acquainted with that principle as I, so I will pass it. In order to hold a private carrier at fault, the cargo owner has got to show negligence in some respect or another. Now, at the start of this case, I gave a notice to produce an insurance loan receipt, and for a reason which might have been known to you gentlemen at the time, I proved that this barge—all of the barges—the six that came down in tow of the Express, and the tug Gerald A. Fagan—that the owner, the Marine Transit Corporation, had used that amount of care which the ordinary reasonable man is admitted to use in the conduct of his business, to put this barge in a seaworthy condition; and I say to you, that when this insurance carrier, who is the only party at present interested here in the recovery on his policy, fixed his rate, he did that, knowing full well that a private carrier is not responsible for the negligence of his men, if he has used due diligence to make this vessel seaworthy at the time they loaded the cargo; and so I say to you that the premium which the carrier received, and the policy he issued, he did with his eyes fully open, and he did it knowing full well that the

388 law of the United States says that under these conditions, the carrier is not liable for the negligence of any member of the crew, either of the barges or the tub, and there is a reason for that. It is not like a building operator, it is not like running a manufacturing industry. There the matter is constantly under your eyes or under the eyes of some executives. Here a carrier has no control after they once leave the port of shipment, until they arrive at the port of destination, and so that is the reason that has crept into the law of this country. The
389 same applies in like manner to what we call the Limitation of Liability Act. But you can pass by that, if you want to, and on the evidence presented here, I will try this case on the evidence that Dreyfus has presented here, and on that evidence alone he is attempting to show that we brought this barge in wrong. I will even grant, for a moment—although I did not bring them in—I will even grant, as he says, although the law of physics is against some of his assertions, as certainly we could not bring a boat 110 feet long into a space 45 feet wide at an angle of 60 degrees, as she would have
390 been jammed sideways long before we reached this point. But I would say that we did bring them in wrong, for the sake of argument, and I say that we did hit this lock wall here, and I say that we hit it, as he said we hit it, 18 to 30 feet, according to various estimates of his witnesses, and that we started to slide along the wall. Now, on that point I will argue simply from his own testimony, that there was no damage done when we hit that wall. All of the

witnesses admit that the damage was done when we hit the sluiceway. I think we could concede that amongst ourselves. I do not think there is any claim to the contrary. The first point is we could not have hit the wall 30 or 18 feet from the sluiceway, at a speed of 3½ or 4 miles an hour—and that is about the maximum speed the vessel can make through the water—and if we did hit this concrete wall at a speed of 3½ to 4 miles an hour, this wooden barge, with 4 inch planking—it is almost an inevitable conclusion, we would never have to 392
wait until we got to the sluiceway for the barge to commence to leak. She probably would never have reached the sluiceway. So I said, and Captain Wentworth said, we slowed down when ~~we got~~ inside the guide wall. He tried to bring out from Mr. Whalen that we were coming at an excessive speed, and Mr. Whalen said we were coming at a slow speed. There has been no evidence put in here as to anything in our navigation that was excessive, and I would say we hit that lock wall—as Captain McGowan told us, at a speed of about 1 mile an hour. Now, say we hit it wrong, and we 393
slid along. If Mr. Whalen has been on that lock for 16 years—if I remember his testimony correctly—and he said he watched it, he expected it to come along, he did not expect it to stop at this sluiceway, and when it did stop he was the most surprised man in the world. It was in connection with his testimony and on our theory of this case, that I produced Mr. Hildebrandt here, and I also brought it out from Captain McGowan, that the hole in the

394 boat was down at the bottom. The side of this boat is absolutely perpendicular, pushed in maybe a little at the bottom, from my own knowledge, but there is no testimony—and the testimony of the lock—of the engineer of the United States Engineer's Department, Major Myton—is that the wall is perpendicular. Now, it seems to me, beyond any doubt, that if this perpendicular surface of 12 or 14 feet should hit that corner there, which is also perpendicular, that there should be damage not confined to one small little space, it should be
395 damage which should show almost over the entire head of the vessel. And this last testimony, brought out from Mr. Hildebrandt, the barge was less than 10 feet something at the stern—9 feet at the side—I suppose that was to show she would hit on the bottom, but that small difference in depth at the bow and stern, spread over 14 feet, would be very minute, and even taking that on his own argument, if we would enter into it, why it would be the very bottom of the bow which would have been damaged, and not at a point 2½ feet from the bottom. So I say to you, bearing these facts in
396 mind, the fact that Mr. Whalen stated that this sluiceway is used to carry away debris and floating logs, and that they ordinarily examine it every day to see that nothing gets jammed in there—and if I remember his testimony correctly, he said it did not go all the way to the bottom, but that the sluiceway extended down a distance—an opening of about 10 feet. So the irresistible conclusion, from the nature of the damage to a barge of her construction, the

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fact that the wall is absolutely perpendicular, leads to only one conclusion, and before I tell you the conclusion, I want to explain something else. We all have some idea of construction of barges. Every part is joined together like any vessel, and a blow to any part of the surface of that barge will always react in the corners, in the openings of seams; in other words, everything is so joined together that the strain has to be imparted to other parts of the vessel, and that is true except where something punctures a vessel. If there is some sharp object that punctures a vessel, it will just shove a hole in her, and the vessel will break it off and slide by.

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I want you to bear in mind the only testimony in this case—Mr. Hildebrandt testified, a man who has been in the drydock business fifty years, probably the most experienced barge builder in New York, wholly disinterested, because, as he said, he repaired the vessel for this man who bought the boat in a sunken condition—told us exactly what kind of a hole was in the bow of this barge, and that was located at a distance on the starboard bow, starting a foot and a half from the bottom and extending up 2½ or 3 feet. There was not another sign of damage on that starboard bow, and I say, bearing that in mind, the irresistible conclusion is there must have been something protruding from that spillway or sluiceway, that when this barge rubbed along she must have caught into it and stopped; and I asked Mr. Whalen that question—and you sustained the objection—and I asked—and we

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can just as well draw the inference that Mr. Whalen was surprised the vessel stopped. He had seen other barges. Every witness who took the stand here had to—so unwillingly, so reluctantly, but they had to admit that this rounded bow barge—they have all seen them—with their bow up against this wall—they have all seen them slide along, they have seen them slide along this sluiceway by these recesses, as they call them, in to the lock. We say they cause damage, yes, they do cause damage, they do not cause sinkings, they do cause damage
401 though, in that they tear off the irons and they rack up the respective bow sides of the vessel, and in that way we say they cause damage. We do not contend they cause sinkings. Now, that, I say, should be the conclusion, as I see it, from this case. But from my case, as I presented it, I say we are not even at fault for the barge striking this guide wall, which they had a right to do, and I will not rely on my testimony, I will rely on Mr. Otto's. He put Mr. Whalen on the stand. He was not on the payroll of the Marine Transit Corporation. The
402 barge Ryan's testimony shows she was chartered by the Marine Transit Corporation from outside people, and I asked Mr. Whalen, I said to him, "I will ask you a frank question, I want a frank answer", and I said "Did you see anything in the navigation of that tug, at the time they were inside of that bullnose, at a distance of 100 feet, that you could say caused this vessel to sheer?", and he said "No".

Now, we are dealing with this Government Lock at Troy just the same as other locks along

the Erie Canal. Most are built with a dam on one side, and that is where the lift is or the drop-down, and this is no different, except that here there was always a certain amount of current. The Mohawk River empties into the Hudson five or six miles above this dam. The North River comes down, joins the Mohawk at Waterford, and flows down together the remaining six miles. The lock and the approach wall are built at an angle to the set of the stream. The sluiceway in there, for whatever purpose it was built, certainly does cause some suction 404
or danger to that side. Barges coming into this narrow confined place cause a certain amount of displacement, the lock being empty before the fleet arrives and being filled up again causes a certain amount of backwash, and so the navigation of this Canal, without doubt—probably you gentlemen know as well as I—has been followed by a tremendous amount of danger, and this question of sheer is no new or knotty problem. What causes it in a given instance is hard to say, whether it is just on account of the nature of the valves down here in the lock, or the subsequent action of 405
the closing of the valves and the fleet arriving in a confined place with a certain amount of displacement, whether it is the Ford Plant starting up or opening up its valves, which causes some disturbance in the water there, I must confess I must admit I do not know, but as I do say, as Major Myton said and admitted that first, that the flow of the stream of this river sets against this guide wall, since he admitted the Ford Plant contributed some draw. He admitted also that the closing of

the throttle of the valves causes some draw or suction, and he also admitted that the entrance of the barge drawing 8 to 10 feet, 110 to 112 feet long, or a total length of 324 feet, and the tug itself, caused a certain amount of displacement, and all these things nobody can put their finger on it. Maybe, two or three happen at the same time. I confess I do not know. The captain of the tug, an honest man, no longer in the employ of the Marine Transit Corporation, stated that he was coming in there. These three barges were following
407 straight behind. Even Captain Wentworth admits the same thing absolutely—three barges straight behind. They were coming along fine. The tug was headed straight for the lock, and the barges followed right in line with the tug. Then, without change of course on the part of the tugboat, and their witness admits that, something gave the tug a sheer. We are not liable for something. We are liable, and the burden of proof in the last analysis is on the libellant. We are liable for some overt act of omission or commission, and what we say is, you point out where we committed some act or
408 omitted to do some act at the time when he says this barge took a sheer, and if he points that out in the evidence, then we are liable, but his failure to do that, and if he takes his own testimony, and he is bound by his own testimony —if he takes the testimony of Captain Wentworth, the same gentleman, then you have got to dismiss this proposition against the Marine Transit Corporation, and I tell you again, gentlemen, that if you do find that this barge did

go over against the wall, and that they did go over against a wall through the negligence of this carrier, then you have got to go a step further, you have to find how this damage occurred, and in finding out how the damage occurred, I want you to revert to the testimony which I reviewed when I opened this summation, and that is that this damage was confined to the starboard bow of this barge to a very small portion of it, and that she had a hole knocked into her, and that there was no crushing to the side which would follow naturally from her hitting such a hard substance 410
as a corner of a concrete wall. There is no evidence here that the supporting timbers that held this 4 inch bow planking in place—that any of these were crushed in. The evidence is —and uncontradicted—that she had a hole punched into her, and when we think of a hole being pushed into a vessel, we think of some protruding object, or coming into sharp contact with something like heavy ice, or hitting a burden that is protruding somewhere—something like that—and gentlemen, I don't want you to forget that the only conclusion that can be reached is the fact that there was driftwood, 411
some kind of a heavy submerged floating log, got in that sluiceway, and when you come to that conclusion, do not deal with inferences that that is impossible, because Mr. Whalen told us that practically every day they go down there to see if the sluiceway is kept clear, and on the day in question he said he did not remember whether he or the other locktender went down or not.

I thank you.

412 *Libellant's Summation.*

Mr. Otto: Mr. Chairman and gentlemen of the Committee: my friend Mr. Lenahan has tried to make out, by argument, a lot that he has been unable to obtain witnesses to testify to, in support of his case. Is the mate of the tug Fagan in this room—Mr. Flynn? I am very sorry that my friend has not called for the mate of the tug, who was at the wheel at the time the accident occurred. He is here. They have been able to get him. The only presumption that arises from the failure to call him as
413 a necessary witness, is that if called his testimony would have been adverse. I am sorry, as there were a few questions I might have asked. My friend has just said that if we are unable to explain how this accident happened, that the Marine Transit Corporation is not liable. I differ with him in this respect—I believe that it is the burden of the carrier to either deliver the cargo or to satisfactorily explain that its failure to so deliver was not caused by any fault or negligence on his part. The burden of proof in that connection is with the carrier.

414 Now, with respect to the witnesses, you appreciate undoubtedly that Louis Dreyfus & Company had no persons representing them on this fleet of boats at the time of this accident. It was therefore necessary for me to investigate the matter and to find such witnesses as might come for them or whom I might get by a subpoena issued by the United States District Court. The witnesses, employees of the Marine Transit Corporation, or people from whom they chartered these boats, undoubtedly could be readily procured by them. I have

taken the liberty, and I think the daring, to go right into the enemy's tent, get the witnesses whom they should have called—called them myself and taken the risk that their testimony might—that this might prejudice or penalize or otherwise their testimony may be other than that which I may have expected from them. I also went to the trouble and expense of calling the United States Government employee at Troy, certainly a disinterested witness, to tell you what he knew. Major Myton has testified quite at length, somewhat informally, without any leading or guiding from me, answered your questions fully, and I believe the effect of his testimony has shown the following: First, that there was no current, or practically no current at this place in the approach to the lock where this accident happened. At another place, over the dam, he said the current was a mile or a mile and a half, the current above one-half of that, if I remember correctly, at the place where we are interested there was no current or practically no current; that the water on the day of the accident was 2 feet below normal. It is quite significant, that testimony, because 2 feet below normal means that the water going over the dam was only about 4 or 5 inches, instead of 2 feet which is the normal. Furthermore, it is the duty of the captain of the tug to know water conditions, to know the currents, etc., and to make due allowance accordingly. Therefore, if they fail in that respect it is negligence on their part. Now, you have seen and you have also heard Major Myton say that over 100,000 boats cleared through this lock without

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any sinkings, before this. That in his opinion, the lock is a safe place to navigate; that even after this disaster occurred, he made no recommendation to change that condition one bit. It indicates the courage of his convictions and the strength of his opinion that it is a safe place, assuming, of course, that, which we may reasonably expect, navigators will use proper diligence in approaching the lock. I believe he has also testified that over 10,000 boats of all types passed through this lock during the same year—1928. That this was the first sinking in 419 the lock since the lock was constructed in 1915, all of which certainly proves this is not an inherently dangerous place, or we would have a lot more of them. You have seen a picture of this sluiceway, but it seems that you could see this place with the naked eye. You have heard the testimony that this accident occurred in broad daylight, about 5 o'clock, visibility good. You could see these conditions, so there was no danger which ordinary prudence might not have seen and prevented. You have further heard the testimony of the captain of the barge, subpoenaed by us, Captain Went- 420 worth—who was on the bow of the boat that sunk, testify as to the position of these boats when they approached the lock, testified that this was the position as indicated by the map. You have also heard the corroborating testimony of Mr. Pickett, the Government employee whom I telephoned to last night, between 6 and 7 o'clock, to come down so that you could hear his story, as it was only last night that Mr. Myton told me that Mr. Pickett was in a position to see the thing in a better light,

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better position than any other witness. I thought I would call him that you might get the benefit of his testimony. He has come, you have heard his testimony to the effect that this tow was lined up as this picture describes—that this tow was lined up in this fashion, although he had seen no other tow lined up in that way before, and he has been there 11 years, say that it is his duty to lock them through every day. He also corroborates the tub having put in a jingle. You heard him use the word "jingle". You have heard Captain 422
Crossen, the expert whom we called, the employee of the Pennsylvania Railroad twenty-five years, who testified in many courts before as an expert—my friend Mr. Lenahan has used him as an expert—testify to what a jingle was, and that this hook-up, the way the tow was coming in, was an improper way to land the boats. That he would not have done it. That after he saw the boats scraping, he would have backed up instead of going full speed ahead, which only caused the bow of the boat to hit with more violence and cause the sinking. It is a remarkable story I am putting out. You 423
heard the testimony of Captain Wentworth, who said right after he struck there was a jar, and one of the vertical planks came shooting right out of the water, which he reckoned to off his boat. Something has been said by Mr. Lenahan—no evidence produced by merely conjecture and argument—that there may have been some driftwood. How can he explain that this boat struck this sluiceway with the violence that caused the jarring, with the violence that caused a plank to come up? Captain Mc-

Gowan has been called by the carrier as their witness. Mr. McGowan testified, I believe, as follows: that he is captain of the boat, he was off duty, expected to go on watch in about an hour, and he had been off duty since 12. Worked 6 to 12 noon, and this thing happened at 5, still he was on deck. He saw everything, how it first struck the sluiceway—that is his testimony. All the witnesses I have called, State employees as well as the barge captain, Captain Wentworth, some say I think 30, some 40, some 50—but there is no question but that the boat did strike the upper guide wall at an angle, then scraped along slowly before it came violently in contact with this sluiceway so as to cause several planks to come off and water to come into the boat and to sink only about 20 or more feet away after she got in the lock. There must have been some violence to cause a boat to sink so quickly after she struck. Captain McGowan was asked several questions by me. I asked him whether this was the first trip he made through this lock with this boat. I believe you will recall he testified that it was. I asked him whether he knew the water conditions on that day, and the testimony, as here presented by experts as well as lay witnesses, indicate that that is an important question. It is the duty of a captain of a steamboat to know water conditions, as you can readily appreciate it. He stated he did not recall, didn't know. I asked him whether he knew the current—didn't know. I asked him whether he knew the steering apparatus was not set up for steering on the barges—he didn't

know, although I believe you have heard the testimony that it is the duty of the captain to make up the tow and to make it up safely. It further shows then the sole responsibility for the safe navigation of this tow was upon the tug as there is nothing the barge could do for steering, as there was no apparatus set up. Further there were two short hawsers which gave very little change. Now, you have heard that this tow approached the lock at an angle which is at an improper angle of approach. You have heard that this tow was speeding at 428
a fast rate of speed. Captain Wentworth, without contradiction, I believe, testified that the tow was proceeding about 3½ to 4 miles an hour, which is quite an excessive speed, and Captain Oatman, a captain on the Canal for I believe nine years, has been through the locks about ten times each year, his testimony is that a mile and a quarter would be safe. Now, I believe the trouble in this case, although I naturally was not there, but from the story as I get it, witnesses' testimony—experts advise—is that this tow was proceeding at a fast rate of speed, until it was pretty close to the lock, 429
until it realized it was pretty close to the lock. Then suddenly it saw itself in danger, slowed down, but a little too late and three loaded barges in tow, with all that momentum, would keep coming even after the tug might stop or slow down. The tug either slowed down or practically stopped. After she got pretty close to the lock, Captain Wentworth said, I believe, 80 to 100 feet south of the bullnose to the approach of the lock, the effect of that sudden

slowing down or stopping is to lose control of the tow, which as Captain Crossen and Captain Oatman testified, allowed a slacken of the hawsers that caused the boats to go either way. In this case, the head barge went to the starboard, the right side. She scraped, then she scraped for quite a distance, but I believe it was negligence from the fact that the tug proceeded at an excessive rate of speed and did not slow down until it was in a dangerous position and too late to do so with safety to its tow. I believe the tug is negligent for, having
431 once seen this boat sheer after causing it to slacken the hawser and slow down, it did nothing to corret it. It allowed this barge to drag this guide wall for a distance varying from 30 to 60 feet or so. Then, when she was right up to the sluiceway, instead of then stopping and backing up, she put full speed ahead, increasing the violence with which this boat struck the sluiceway. You have heard the testimony of Captain McGowan, their main witness, who admitted there was no unusual condition with respect to the navigation on the day in question. If there was no unusual condi-
432 tion existing with respect to the navigation on the date of the accident, then what caused it? The tug captain is supposed to have a certain amount of skill, he has in his custody considerable property, valuables as well as lives. Captain Wentworth in this case, I believe, had two daughters on his boat and there is a responsibility attached to a captain of a tug, a certain amount of experience he is supposed to have. He is supposed to know conditions which

are ordinarily to be faced in the navigation of boats, so he may guard against them, but adds almost insult to injury, without any provocation, so far as has been brought out—and this is the end of the case—without any provocation, clear day, broad daylight, visibility good, water conditions low, practically no current, etc.—this boat was allowed to strike and sink. The only conclusion that may be drawn from it is that there was negligence somewhere in the navigation. I have pointed out specifically in what respect. It is only necessary, in my 434
opinion, to prove one specification of negligence, but I think I have proven a number of specifications of negligence. You have also heard Captain Wentworth testify that he called to the deckhand of the tug and asked him to slacken the hawser—I think the port hawser—and that the deckhand didn't do it. That the deckhand told him, right after the accident, that he couldn't do it unless he was told to do it. Where was the mate—what was he doing—was he paying particular attention to the work? If so, why didn't he attend it. The boats may sheer, but if they do sheer, if 435
boats are drifting and they are supposed to drift in without very much headway or momentum, it is a simple thing to back up and straighten them out or pull a little harder on the one hawser and straighten them out, but if they are coming at a pretty good speed, it is equivalent to a truck or three tractors coming at a pretty fast rate of speed and suddenly without excuse trying to stop—something is going to happen.

436 *Libellant's Summation.*

Mr. Lenahan has been frank to say that he did not know what happened—what caused it—and in answer to the libel, Mr. Lenahan set up a defense that indiscernible current caused it. Therefore, I directed a good bit of evidence or proofs to prove that there was no current, or practically none, and that a current didn't do it. That is the only explanation that he made, because his answer was—he said the only explanation was that some indiscernible current caused this boat to do what it did do—to
437 sheer. With the water conditions as I have enumerated, conditions of navigation safer than usual, I believe it was not only the ordinary negligence, which necessarily must be established to win, but I believe there is gross negligence, I do not think in the first place they did anything to prevent it, and after seeing themselves in a dangerous position they did not use good judgment to get them out of it.

Now the charterparty provides that the carrier shall be liable for his negligence or fault, so the question is whether the carrier is negligent or not. If the carrier is negligent, we
438 expect your Committee to give us the award. Of course, if you find the carrier is not negligent, your award should go to the carrier. As I said in my opinion, Mr. Lenahan has tried by his argument to prove things which he has not called witnesses, in the usual course, to prove, which would have, of course, allowed me the right or privilege of cross examination and an opportunity to dispel any inference which you might otherwise have to draw.

I thank this Committee for the consideration they have given me, the courteous treatment, and I await your award with confidence.

Dreyfus' Exhibit 1. 439

John D. Schoonmaker, President — Gerald A. Fagan, Vice-President

MARINE TRANSIT CORPORATION
Lighterage—Towage
17 Battery Place
New York City

Telephone
Whitehall
7576
7577
7578

Boxes
Scows
Derrick
Covered
Barges 440

August 17, 1928.

WE HAVE THIS DAY CONFIRMED BOOKING, CANAL FREIGHT:

BETWEEN: Marine Transit Corporation, Owners or Agents

AND: Louis Dreyfus & Company, Charterers.

THAT the said Owners or Agents will furnish Insurable Canal Tonnage, for grain, as below:

QUANTITY: Two fleets, about 200,000 Bushels Wheat. 441

PORT OF LOADING: Buffalo, N. Y.

DATE OF LOADING: September 1/15, 1928.

DESTINATION: New York, N. Y.

RATE: 6¼ cents per Bushel, NET TO BOATS.

INSURANCE: CARGO AND FREIGHT, to be placed by and for account of Charterers, Carriers Liability to be placed by and for account of Owners or Agents.

442 OTHER TERMS: Subject to New York Produce Exchange Canal Grain Charter Party No. 1 as amended.

MARINE TRANSIT CORPORATION
Owners or Agents
GERALD A. FAGAN

LOUIS DREYFUS & COMPANY
Charterers
J. G. BENNETT

443

444

Dreyfus' Exhibit 2. 445

NEW YORK PRODUCE EXCHANGE
Canal Grain Charter Party No. 1

(Adopted by the members of the Grain Trade of the New York Produce Exchange at a meeting held May 12, 1924, and approved by the Board of Managers of the New York Produce Exchange May 23, 1924)

Amended August 6, 1925, April 1, 1926, March 22, 1928.

IT IS THIS DAY MUTUALLY AGREED 446

Between .....
(Owners or Agents)

and .....
(Charterers)

That the said Owners or Agents will furnish insurable Canal tonnage for grain as below

QUANTITY

..... bushels of .....

PORT OF LOADING 447

.....

.....

DATE OF LOADING

.....Loading between ..... and .....

.....

Unless otherwise agreed boats must be tendered at loading port properly passed by the surveyors

448 for underwriters as being ready to load between the hours of 9 A. M. and 5 P. M., but if boat or boats tendered are seaworthy and are properly passed on arrival of said surveyor, then if boat or boats have tendered within contract period, no penalty is collectible by charterer.

DESTINATION

.....

RATE

.....cents per bushel of .....
449 pounds, delivered weight, exclusive of elevation at ports of loading, but including trimming, transportation to destination, and delivery at any point accessible by water within the free lighterage limits of New York Harbour, except deliveries to New town Creek and Gowanus Canal, which shall be subject to additional towing charges to cover cost of movement between mouth of Newtown Creek and destination and Court Street and destination.

INSURANCE

Unless specifically excluded at time of charter ing Freight Rate includes Marine Insurance on cargo, freight and import duty, if any, which is to
450 be covered by Charterer and premium to be deducted from the freight. Amounts insured to be reported to the Underwriters separately as follows:

1—Value of merchandise (including elevation and costs, if any) figured at market value of merchandise at loading port at time of loading plus 5%. In case of disagreement value to be fixed by the Grain Committee of the New York Produce Exchange, which will be final.
Any additional value desired may be placed by charterers at their expense.

2—Duty, if any. 451

3—Freight.

Insurance covering Carriers Legal Liability must be placed by Carriers at their own expense, proper binder to be furnished Charterers if requested.

GENERAL AVERAGE

General Average and/or salvage charges to be adjusted according to the rules and customs of the Port of New York.

BONDS

452

Canal Companies to clear all United States Government T&E Bonds.

Owners of the grain must notify carriers in writing when ordering bonded grain from elevator. In absence of such notice from the owners of the grain, the owners will assume any penalties imposed upon the carriers by the Government.

WHARFAGE CHARGES

Canal Companies to pay customary wharfage charges, if any, in New York Harbor.

If charterer orders grain to steamer before permitted by said steamer he shall be liable for any wharfage charges incurred at ship's side until beginning of time permitted by steamer. 453

DEMURRAGE

A. The Charterer (or his agent or assigns) is to be entitled to three (3) days, exclusive of Sundays and legal holidays (Saturday afternoon not to be construed as a holiday) to unload. Official written notice of arrival at 53rd Street, North River, or other canal termination south thereof (unless advance orders have been placed) must be delivered

454 to Charterer (or his agent or assigns), free time to commence from the first 12 o'clock noon, New York City time, following delivery of such notice. At the expiration of free time period, the demurrage rate shall be four (4) cents per ton of 2000 lbs. per day on actual amount of grain loaded into boats.

B. Boats shall have the option to discharge on arrival (if orders have not been filed) into a public elevator at their own expense, and give free lighterage outward to final delivery. Written notice of such intention to discharge shall be given Charterer twenty-four (24) hours prior to ordering to such elevator. Storage at the rate of .1/20c. per bushel
455 per day is to be paid by Charterers after three (3) days' free time has elapsed. Insurance is to be covered by owners of the grain. Charterer (or his agent or assigns) is to be entitled to as many delivery orders as there were boats delivered to elevator for his account, insurance risk for any lighterage delivery from elevator to be assumed by owners of grain, or order to be for less than 8,000 bushels, unless extra expense due to smaller quantity is paid by Charterer, and no credit to be given for any unused portion of this privilege.

Carriers shall have further option of transferring cargoes to other insurable barges (boat for boat)
456 instead of to a public elevator under conditions of paragraph next above, except that demurrage rates applying to original barges, shall apply in place of designated elevator storage rate. This shall not be construed as final delivery.

C. If cargo is stored in elevator in accordance with Paragraph B above, Charterer (or his agent or assigns) shall have the option of accepting final delivery in elevator at any time prior to ordering out of same, in which case elevation and storage from date of elevation must be assumed by him.

DETENTION 457

A fleet shall consist of boat or boats, as designated by carrier at time of booking, and adequate motive power to tow the boat or boats to destination with continuous movement and under ordinary circumstances. A fleet shall sail within 24 hours of completion of loading and proceed to destination without delay, except that due to accidents, Acts of God, strikes, lockouts, fires, or rendering necessary aid to other vessels in distress or danger. Owners shall pay charterers demurrage at rate of 4c per ton of 2000 lbs. per day, or fraction thereof, for any detention at loading port beginning 24 hours after completion of loading and until beginning of voy- 458
age; also for any unnecessary (avoidable by ordinary care) delay enroute, but no demurrage is chargeable for any detention at loading port between loading dates specified in charter party if operator notifies charterer before loading that boats will not move until last date. This paragraph is not applicable to any unit less than a fleet defined above, as regards delay at port of loading but does apply otherwise.

OUTTURN:

Official weight certificates covering quantity loaded shall be conclusive as between shippers and 459
assigns and carriers as to quantity of cargo received inward and to be delivered on final delivery.

The boat owner and/or operator and/or carrier shall be responsible for all damage caused by their negligence or fault but shall not be liable for losses caused by dangers of navigation, fire or collision, except where caused by their negligence or fault. Neither shall they be liable for acts of God, quarantine or the public enemy. The carrier shall be paid in full by consignee for any excess cargo deliv-

460 ered at destination, and any shortage in delivery in excess of 1/8 of 1% of intaken weight shall be paid for by the carrier, at the market price of a like kind and grade of grain at New York on the day when shipment is delivered, and final quantity determined; these adjustments to be made in cash at time of payment of freight.

In case the grain becomes heated while in transit (such heating not being caused by leakage of boat, or heat from boiler or machinery) the Carrier shall deliver his entire cargo and collect his entire freight charges on bill of lading weights.

461 SEPARATE CHARTERS:

Each boatload (or parcel, if less than a boatload) is to be deemed a separate charter.

CANCELLATION CLAUSE:

If grain is not ready for boats when tendered within contract period, charterers will have an extension of five days at a penalty of 1/2c per bushel. If grain is not ready within this additional period, boat owners have the option of cancelling charter or rechartering; loss in freight, if any, of rechartering to be paid by charterer.

If carrier fails to tender boat or boats in contract
462 period, an extension of five days will be allowed at penalty of 1/2c per bushel. If boats are not tendered within this additional period, charterers have the option of cancelling charter or rechartering; the extra expense, if any, of rechartering to be paid by boats.

After November 5th, of each year, the options referred to in the two preceding paragraphs may be exercised at end of contract period. In such event, should the boats be unable to secure other cargo before official closing date, charterers shall be liable to them for the full amount of freight called

for in the charter party. Similarly should charterers be unable to recharter before official closing date or if able to re-charter but unable to secure insurance equal to charterers customary policy, boats shall be liable for the extra cost of delivery to destination via railroad.

PAYMENT OF FREIGHT:

80% of the total freight is due and payable on arrival of boats at Destination, the balance, together with demurrage and towing and/or other proper charges is due and payable after delivery has been made and actual outturn weights ascertained, subject to deduction of shortage allowances, or other substantiated claims under this particular charter.

If shortage amounts to more than 20%, carrier shall refund to the cargo owner any freight paid on any shortage in excess of said 20%.

Freight is guaranteed and payable vessel or cargo lost or not lost.

In the event of loss or damage which requires return of cargo to the point of shipment or the discharge of cargo at any intermediate point or place on the voyage the full freight thereon shall be deemed to have been earned and shall be paid accordingly, but no additional freight shall be paid on grain forwarded from point of loss or damage to destination on same voyage and in the original vessel.

TOWING:

The Charterer to be entitled to one free-delivery on each boat within the lighterage limits of New York Harbor, and to one elevator loading on a boat at loading port. The charterer shall pay for any additional tows beyond this amount at prevailing rates. This applies to canal boats arriving afloat

466 and does not affect deliveries to elevator under demurrage Clause B.

BILLS OF LADING:

Bills of lading must be issued to conform with this charter party in every respect. No additions or alterations are valid without the written consent of charterers. It is distinctly understood and must be so stated on the Canal bill of lading and the said Can bill of lading, when properly endorsed, carries full title to the property and that the issuer thereof warrants that a similar quantity and grade of grain has been cancelled from an original lake
467 bill of lading and/or elevator receipt which likewise carried full title.

If grain is billed on original lake documents through from Western lake ports to New York, the issuance of Canal bills of lading will not be required.

Original lake or canal bill of lading carrying title to the grain properly endorsed must be surrendered with orders for final delivery, and cancelled by carrier or its agent.

DISPUTES:

All disputes arising under this contract to be ar-
468 bitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding.

.....
(Owner or Agent)

.....
(Charterer)

Dated 192

Dreyfus' Exhibit 3.

469

CANAL SERVICE CORP.

Date—9/13/28 Barge—Edward A. Ryan.
Ex-Lake Vessel—Pioneer Hold—3
Elevator—American
Kind of Grain—#4 Man. Wheat
Started—8.20 A. M. Finished—10.00 A. M.
Draft Pounds—30000 Bus.—500 Weights—2/8
2/9 2/2 2/1

1	2	3	4	5	6	7	8	9	10	5,000
1	2	3	4	5	6	7	8	9	10	5,000
1	2	3	4	5	6	7	8	9	10	5,000
1	2	3	4	5	6	7	8			4,000
12000 lbs. = 200 bu. # 1										200
Total Bushels										19200

470

Elevator Weighman—Masterson
Tally Man—W. C. Whalen

Dreyfus' Exhibit 4.

STATEMENT OF CLAIM

19,200 bushels #4 Manitoba wheat

471

Market value at New York City on September 25, 1928 as per records of the statisticians of the New York Produce Exchange $1.19⅞ per bushel.

19,200 bu. @ $1.19⅞	$23,016.00
Interest for 14½ months on $23,016.00 @ 6% per annum or 7¼%	1668.66
	$24684.66

472 **Dreyfus' Exhibit A.**

November 1 1928

RECEIVED from the STANDARD MARINE INSURANCE COMPANY, LIMITED, Twelve Thousand Three Hundred Ninety Six .....00/100 Dollars, as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to sinking at Troy, N. Y. on or about Sept. 25 1928 or from any insurance effected by any carrier, bailee or others on said property, and, as security for such repayment we hereby pledge to the said STANDARD MARINE INSURANCE COMPANY, LIMITED, the said recovery and deliver to them duly endorsed the Bills of Lading for said property, and we agree to enter and prosecute suit against said Railroad, carrier, bailee, or others on said claim, with all due diligence at the expense and under the exclusive direction and control of the said STANDARD MARINE INSURANCE COMPANY, LIMITED.

478

Per pro LOUIS DREYFUS & Co.
(Signature illegible)

$12396.00

474

Description of property:
Wheat

Dreyfus' Exhibit B. 475

No. L. R. 9842

By endorsement hereof, the payee acknowledges having received the amount of this draft as a loan for loss as described.

Nov. 5th, 1928.

This Draft Is to Be Presented to

CHUBB & SON 476
Managers and/or General Agents

at

THE NATIONAL CITY BANK OF NEW YORK

Pay the sum of Twelve Thousand Three Hundred Ninety Six .....00/100 Dollars to the order of LOUIS DREYFUS & COMPANY.

$12,396.00

c/o Otto & Company, Inc.,
2 Broadway,
New York City. 477

CHUBB & SON,
Managers and/or General Agents,
WM. STEVENS
Attorney

478 Federal.

CHUBB & SON
5 & 7 South William Street, New York

Federal Insurance Co., of New Jersey
The Sea Insurance Co., Ltd., of Liverpool
The Marine Insurance Co., Ltd., of London
The London Assurance (Marine), of London
Alliance Assurance Co., Ltd., of London
Hartford Fire Insurance Co., of Hartford
Merchants Fire Assurance Corp. of N. Y.

Claim for—T/L—Wheat
479 Steamer—Barge E. A. Ryan
Voyage—Buffalo to New York.
Accident—9/25/28. Barge in collision and sank.
Charge—Losses.
Marks & Numbers—#4
Our Claim No.—28—7536
Checked by—R. H. K.
Examined by—
C A H
10/2/28

By endorsement on the back hereof, the payee of the above draft acknowledges having received from
480 CHUBB & SON, Managers and/or General Agents, the amount thereof, as a loan, repayable only to the extent of any net recovery the payee may make from any vessel, carrier, Bailee or others, upon or by reason of any claim for loss of or damage to the property described in the margin hereof, or from any insurance effected by the payee or by any carrier, bailee, or others on said property, and as security for such repayment, the payee hereby pledges to the said managers and/or general agents all such claims and any recovery thereon.

The payee hereby appoints the said managers 481
and/or general agents, and their successors, severally, the payee's agents and attorneys in fact, with irrevocable power to collect any such claim, and to begin, prosecute, compromise or withdraw, in the payee's name, but at the expense of said managers and/or general agents, any and all legal proceedings which they may deem necessary to enforce such claim or claims, and to execute, in the payee's name, any documents which may be necessary to carry into effect the purposes of this agreement.

In further consideration of the said advance, the payee hereby guarantees that the payee is the person entitled to enforce the terms of the contract of 482
transportation set forth in the bills of lading covering the said property.

(On Side)

Draft Will Not Be Paid If Detached From Receipt

(Stamped on Face)

PAID
Inter Office Cash
Nov. 8—1928
Chubb & Son, Mgrs.
Check F. L. D.

483

(B. A.
Teller 5
8)

RECEIVED PAYMENT
Through New York Clearing House
Prior Endorsements Guaranteed
Nov 7 1928
THE BANK OF AMERICA
National Association
New York, N. Y.
Charles E. Curtis, Cashier

484 **Marine Exhibit B.**

Buffalo, N. Y.
Ellicott Sq. Bldg.
Phone Seneca 4224

ALBERT R. LEE & CO., INC.
15 William Street
New York, N. Y.
Hanover 0630

No. 1068 Sept. 13, 1928

CARGO CERTIFICATE
485 Non-Negotiable

TO WHOM IT MAY CONCERN:

This is to certify that the Barge Edward A. Ryan has been inspected and found worthy to load Dry cargo within ten days from the date of this certificate, subject to policy conditions and classifications.

ALBERT R. LEE & CO., INC.
F. H. GODFREY
Surveyor

486 ORIGINAL

Marine Exhibit C. 487

BILL OF LADING

Telephone
Whitehall
1463-1464-1465

Towage
Lighterage
Freighting

MARINE TRANSIT CORPORATION
United States Custom Bonded
17 Battery Place
New York City

Sept. 13, 1928 488

Received at Buffalo, N. Y. on board barge E A Ryan the cargo herein described in apparent good order, except as noted, shipper's weight (weight, quality, condition and value unknown) to be delivered in like order and condition (Acts of God, Perils of the Inland Waters, fires, explosion bursting of boilers or breakage of shafts stranding or collision excepted) upon payment of the freight and charges as per freight bill immediately upon notification of arrival of vessel at destination herein. No liability shall be assumed hereunder before loading or after discharge of cargo. This shipment is carried subject to all terms and conditions of Section 3 (only) of the Harter Act (Section 8031 U. S. Compiled Statutes 1918) and of all other Statutes of the United States according carriers by water the protection of Limited Liability. If due diligence shall have been exercised to make the vessel seaworthy no liability shall attach to this carrier on account of losses due to excepted perils or from latent defects or unseaworthiness or from prolongation of the voyage. Approval of vessels by surveyors representing cargo interest prior to sailing shall 489

490 be conclusive evidence of seaworthiness. If the Carrier shall have exercised due diligence to make the vessel seaworthy it is agreed that in case of danger damage or disaster resulting from faults or errors in navigation or in the management of the vessel or from any latent or other defect in the vessel or from unseaworthiness whether existing at the time of shipment or at the beginning of the voyage the Shippers Consignees Owners or Underwriters of the cargo shall nevertheless pay and salvage or special charges incurred in respect of the cargo and shall contribute with the Carrier in General Average to the payment of any sacrifices losses or
491 expenses of a General Average Nature as if such danger damage or disaster had not resulted from such fault negligence latent or other defect or unseaworthiness; General Average to be settled in accordance with the law and usage of the Port of New York. Carrying and towing vessel or vessels are to be considered one vessel for all purposes under this agreement. Carrier to have the benefit of any insurance that may have been effected upon or on account of said property in so far as this shall not void the policies or contracts of insurance. This Bill of Lading is evidence of the private contract of carriage entered into by the shipper and carrier herein and shall be considered as supplemental and
492 amendatory thereto anything in the original charter party notwithstanding. Any and all liabilities of the carrier hereunder shall be those of a private and not of a common carrier.

Ship to—Order Bank of Nova Scotia c/o Abell Fwdg. Co. Inc. Buffalo N. Y.

Ntfy L Dreyfus & Co. New York N. Y.

Ex—Str. Pioneer Hold 3. American Elev. 7/2[illegible]

Remarks—From Ft. William Ont. 7/24/28.

BOND FOR EXPORT T&E 807

Pieces	Description	Weight	493
19 200	Nineteen thousand two hundred bushels No. 4 Nor. Man. Wheat. As per Contract. Deliver only on surrender of original Lake Bill of Lading properly endorsed.		

6¼

Inv. $2704
$1200.00

Ins.

MARINE TRANSIT CORPORATION
F. J. MURPHY
Agent 494

.....
Shipper

(Samped Across Face)
COPY—NOT NEGOTIABLE

495

496 **Award.**

WHEREAS, a controversy existing between LOUIS DREYFUS & COMPANY and MARINE TRANSIT CORPORATION was, by an order of the United States District Court in and for the Southern District of New York, dated the 6th day of September, 1929, submitted by them to the Committee on Grain of the New York Produce Exchange, as Arbitrators, for their adjudication and award, as by reference to which instrument will more fully appear;

NOW, THEREFORE, the above named Arbitrators, having consented to act as such, and having duly
497 met together and deliberately heard the allegations and proofs of the said parties, do by these presents arbitrate, adjudge and award of and concerning the said controversy as follows:

The Marine Transit Corporation shall pay to Louis Dreyfus & Company $23,016.00, the loss caused through the sinking of the barge Edward A. Ryan, plus interest amounting to $1,668.66.

The costs and expenses of this arbitration $362.50 shall be paid by the Marine Transit Corporation.

498 A. C. FIELD
JAS. J. O'DONOHOE
CLAUDE N. HITCHCOCK
JAS. H. BOWNE

Witness:
A. R. CRAWFORD.

Dated New York, December 20th, 1929.

Notice of Motion to Confirm Award.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

SIRS:

PLEASE TAKE NOTICE that upon the pleadings and proceedings heretofore had and upon the annexed affidavit of Henry E. Otto, sworn to on the 23rd day of December, 1929, we shall move this Court at a term thereof to be held for the hearing of motions in the Post Office Building, Borough of Manhattan, City of New York, on the 27th day of December, 1929, at 10:30 o'clock A. M. on that day or as soon thereafter as counsel can be heard for an order confirming the award of the Committee on Grain of the New York Produce Exchange under date of December 20th, 1929, or for such other and further relief

502 *Notice of Motion to Confirm Award.*

in the premises as to the Court may seem just and proper.

Dated, New York, December 23, 1929.

Yours, etc.,

OTTO & LYON,
Proctors for Libellants,
60 Broad Street,
New York City.

503 To:

MACKLIN, BROWN, LENAHAN & SPEER, Esqs.,
Proctors for Marine Transit Corp.,
Respondent-Claimant,
44 Beaver Street,
New York City.

504

Affidavit of Henry E. Otto to Confirm Award. 505

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against 506

MARINE TRANSIT CORPORATION, the Diesel tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HENRY E. OTTO, being duly sworn, deposes and says:

That he is a member of the firm of Otto & Lyon, proctors for libellants, and is familiar with the 507 above case.

Your deponent caused a libel to be filed on December 14, 1928 to recover in a cause of contract, collision and cargo damage for loss of shipment of grain via the New York State Barge Canal. On April 17, 1929 the firm of Macklin, Brown, Lenahan & Speer served a copy of the answer of the Marine Transit Corporation as respondent and as claimant of the diesel tug "Gerald A. Fagan." On

508 the 19th of August, 1929 motion papers returnable August 27th, 1929, were served on proctors for the Marine Transit Corporation and the proctor for the barge John E. Enright, for an order referring the dispute between the libellants and the Marine Transit Corporation and the tug Gerald A. Fagan and the barge John E. Enright to arbitration before the Committee on Grain of the New York Produce Exchange. The motion was granted by Mr. Justice Coxe, the motion papers bearing the following endorsement:

509 "Motion granted only as to the issues raised by the contract between the libellant and the Marine Transit Corporation. Settle Order or Notice."

An order granting the motion was entered the 28th day of August, 1929 but was resettled at the request of proctors for the Marine Transit Corporation, the order resettling the order of August 28th, being entered on the 6th day of September, 1929. A copy of this order is hereto attached and marked Exhibit "A".

The Committee on Grain of the New York Produce Exchange, set a date for the hearing on the
510 4th of October, but at the request of the proctors for the Marine Transit Corporation the hearing was adjourned to the 11th day of December, 1929. The matter was heard on December 11th and December 12th, 1929. On the 20th day of December, 1929 the Arbitration Committee handed down an award in Libellant's favor in the sum of $23,016 and interest amounting to $1668.66. The award is hereto attached and marked Exhibit "B".

Affidavit of Henry E. Otto to Confirm Award. 511

WHEREFORE deponent respectfully prays that the award in all respects be confirmed.

HENRY E. OTTO.

Sworn to before me this
23rd day of December, 1929.

EDWARD J. GARITY,
Notary Public,
Bronx. Co. Clk.'s No. 8, Reg. No. 3181.
Cert. filed N. Y. Co. No. 751, Reg. No. 1-G-473.
Kings Co. Clrk.'s No. 101, Reg. No. 1433. 512
Commission expires March 30, 1931.

513

514 **Exhibit "A".**

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Court Rooms of said Court in the United States Court & Post Office Building, in the Borough of Manhattan, City of New York, on the 6th day of September, 1929.

Present—Honorable ALFRED C. COXE, *U. S. D. J.*

515 LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

516 Upon the annexed consents and on motion of Otto & Lyon, proctors for the libellants, it is

ORDERED that the order entered herein on the 28th day of August, 1929 be resettled and amended to read as follows:

ORDERED that the said motion be and the same hereby is granted only as to the issues raised by the contract between the libellants and the Marine Transit Corporation

and it is

FURTHER ORDERED that Marine Transit Corporation submit to arbitration before the Committee on Grain of the New York Produce Exchange any and all issues under the contract dated August 17th, 1928 between Marine Transit Corporation and Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York.

ALFRED C. COXE,
U. S. D. J. 518

We hereby consent to the entry of the foregoing order and waive notice of settlement.

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Marine Transit Corp.

THOMAS A. McDONALD,
Proctor for the barge John E. Enright.

519

520 **Exhibit "B".**

AWARD.

WHEREAS, a controversy existing between

Louis Dreyfus & Company and
Marine Transit Corporation

was, by an order of the United States District Court in and for the Southern District of New York dated the 6th day of September, 1929, submitted by them to the Committee on Grain of the New York Produce Exchange, as Arbitrators, for their adjudication and award, as by reference to which instrument will more fully appear:

521

NOW, THEREFORE, the above named Arbitrators, having consented to act as such, and having duly met together and deliberately heard the allegations and proofs of the said parties do by these presents arbitrate, adjudge and award of and concerning the said controversy as follows:

The Marine Transit Corporation shall pay to Louis Dreyfus & Company $23016.00, the loss caused through the sinking of the barge Edward A. Ryan, plus interest amounting to $1668.66.

522

The costs and expense of this arbitration $362.50 shall be paid by the Marine Transit Corporation.

Witness:
A. R. CRAWFORD.

A. C. FIELD
JAS. J. O'DONOHOE
CLAUDE N. HITCHCOCK
JAS. H. BOWNE.

Dated, New York, December 20th, 1929.

Affidavit of Richard F. Lenahan, Read in Opposition to Motion to Confirm Award. 523

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

524

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN", and the Barge "JOHN R. ENRIGHT".

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD F. LENAHAN, being duly sworn, deposes and says:

That he is proctor for the Marine Transit Corporation, the respondent herein and the claimant of the tug "Gerald A. Fagan"; that he has had charge of this case since its inception, is familiar with the proceedings which have been had and attended at the hearing before the Grain Committee of the Produce Exchange on the arbitration heretofore ordered by this Court on motion made by the libellant. 525

For the convenience of the Court, annexed to the affidavits herewith submitted in opposition to the

confirmation of the award of the Arbitrators in favor of the libellant, Louis Dreyfus & Company, and against the respondent, Marine Transit Corporation, in the amount of $23,016.00, plus interest amounting to $1,668.66, are copies of the pleadings. The Court will note that the libel proceeds on the theory of tort, alleging negligent navigation on the part of the tug "Gerald A. Fagan" and on the part of the barge "John E. Enright". No answer has been filed by the barge "John E. Enright", although jurisdiction has been obtained over it and it has
527 been brought into the action.

The Court will note, by referring to the order sending this matter to arbitration, copy of which is annexed to the moving papers for the confirmation of the award, that Judge Coxe directed arbitration only as to the issues raised by the contract between the libellant and Marine Transit Corporation. The libellant's cargo of grain was shipped on the barge "Edward A. Ryan" pursuant to a bill of lading and booking contract which referred to and incorporated the New York Produce Exchange Canal Grain Charter Party No. 1 as amended March 22nd, 1928. The bill of lading which was given by the Marine Transit Corporation, the carrier,
528 provided that the carrier should have the benefit of the Harter Act. The Grain Charter Party referred to, which was incorporated, by reference, provides that:

> "The boat owner and/or operator and/or carrier, shall be responsible for all damage caused by their negligence or fault, but shall not be liable for losses caused by dangers of navigation, fire or collision, except where caused by their negligence or fault."

Section 3 of the Harter Act, which is Section 192 of Title 46 of the U. S. Code, applies to private as well as common carriers and accordingly to the carriage of the libellant's cargo by the Marine Transit Corporation which was, of course, a private carrier. The Section, it is our contention, is self-executing and the Marine Transit Corporation would be entitled to the benefits of it whether specifically referred to in the carriage agreement or not. It has been definitely adjudicated in this Circuit that where the towing vessel and the barge are commonly engaged in the joint venture, the owner of 530
the tug is likewise entitled to the benefits of the Act.

The Marine Transit Corporation at the hearing before the arbitrators has offered proof which was uncontradicted that due diligence was exercised to make the barges comprising the tow and to render the tug in all respects seaworthy and properly manned, equipped and supplied. It is, accordingly, our contention that liability for the damage to the cargo could, therefore, in no event, attach to the Marine Transit Corporation.

Furthermore, the Grain Charter Party specifically provided that the boat owner, operator, or carrier "shall not be liable for losses caused by dangers of navigation * * * or collision, except where 531
caused by their negligence or fault". The testimony of the libellant's own witnesses offered at the hearing before the Grain Committee is all to the effect that the damage to the libellant's cargo was caused and occasioned by a collision or contact of the barge "Edward A. Ryan" with an opening or sluiceway in the approach wall of the Government Lock at Troy, New York, without any fault on the part of the tug or of anyone for whom the carrier

was responsible contributing in any way thereto. In order to substantiate this contention, if questioned by the libellant, it will, of course, be necessary for us to refer to the minutes of the hearing before the arbitrators. These minutes were taken by the assistant to the secretary of the Produce Exchange. They were ordered by us on December 27th, but have not as yet been supplied. The representative of our office, who, together with Mr. Otto, libellant's proctor, personally visited the stenographer and ordered the minutes, urged upon her
533 the necessity of getting them ready at an early date and explained that this motion was pending and that the minutes would be required upon the motion, as it was the intention of our office to resist the application for the confirmation of the award. The stenographer said she would do her best to get them out at an early date, but indicated that the only time that she had to do it was at night, as she had her usual duties as assistant to the secretary of the Exchange to attend to during the day. The minutes have, however, not as yet been provided.

The Committee on Grain of the Produce Ex-
534 change which is the Arbitration Board provided for in the New York Produce Exchange Canal Grain Charter Party No. 1, is a committee, deponent is informed and believes, which is appointed by the Exchange by the year. The members of it are not selected separately for each arbitration so as to secure representation on the committee of men best suited to the arbitration about to be undertaken and most likely to be impartial. The members of the committee your deponent is informed and believes and as is more fully set forth in the affidavit of Gerald A. Fagan herewith submitted, are all

associated with grain dealers and shippers, persons or companies in the same business as the libellant herein.

Furthermore, your deponent is informed and believes that Henry E. Otto, the proctor for the libellant, is an insurance broker, the president of Otto & Company, an insurance brokerage house at 2 Produce Exchange, which is the broker for the libellant and for the various companies or firms which the members of the Grain Committee are associated with.

The libellant, deponent is informed and believes, 536
is a member of the Produce Exchange, whereas the respondent and claimant, Marine Transit Corporation, is not a member of the Exchange.

Furthermore, there is no member of the Grain Committee who represents the canal carriers or is associated in business with any of the canal carriers. The Committee is solely and completely representative only of grain dealers and shippers, and only grain dealers and shippers are represented on the Committee.

Section 10 of Title 9 of the U. S. Code provides that the United States Court may vacate the award of the arbitrators: 537

> "(b) Where there was evident partiality or corruption in the arbitrators or either of them.
>
> "(d) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon subject matter submitted was not made."

Under the evidence submitted to the arbitrators and under the broad principles of law which they are required to take cognizance of, because of their

538 *Affidavit of Richard F. Lenahan.*

business affiliations and association in identical lines of business with the libellant and because of their business relations with the proctor for the libellant, they were evidently partial and either exceeded their powers or so imperfectly executed them that a mutual final and definite award was not made.

WHEREFORE deponent prays that the award of the arbitrators be vacated and the case which is already at issue in the District Court be allowed to proceed to trial before the Court so that respondent and
539 claimant, Marine Transit Corporation may have a fair and impartial trial of the issues.

RICHARD F. LENAHAN.

Sworn to before me this
20th day of January, 1930.

JOHN E. BROWNE,
Notary Public, Richmond County.
Cert. filed in N. Y. County No. 1326
N. Y. Co. Reg. No. 0-874
Cert. filed in Kings County No. 337
540 Kings Co. Reg. No. 662
Commission expires March 30, 1930

Affidavit of Gerald A. Fagan, Read in Opposition to Motion to Confirm Award. 541

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against 542

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN", and the Barge "JOHN E. ENRIGHT".

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

GERALD A. FAGAN, being duly sworn, deposes and says:

That he is treasurer of the MARINE TRANSIT CORPORATION, the respondent and claimant herein. 543

The award of the arbitrators herein is signed by A. C. Field, James J. O'Donohoe, Claude N. Hitchcock and James H. Bowne. The committee who conducted the hearing was composed of five members. The fifth did not sign the award.

A. C. Field is the President of A. C. Field & Company, who are engaged in the business of grain dealers and shippers. James J. O'Donohoe is an officer of Grain Growers Export Company, being, as deponent is informed and believes, the Vice-President of

544 *Affidavit of Gerald A. Fagan.*

that company, which is likewise a grain dealer and shipper. Claude N. Hitchcock is an executive associated with Barnes-Ames Company, large grain dealers and shippers. James H. Bowne is associated with the Kusch Grain Company; Otto Kusch, the President of the Kusch Grain Company is an officer of the Canada Atlantic Grain Export Company, being, as deponent is informed and believes, the Vice-President. Both the Kusch Grain Company and Canada Atlantic Grain Export Company are grain dealers and shippers and the Canada At-
545 lantic Grain Export Company, your deponent has by investigation discovered and is informed and believes, has been frequently represented in litigations before the Court by the proctors for the libellant herein and the brokerage firm of Otto & Company, your deponent has ascertained by investigation, are the insurance brokers in connection with the placing of cargo insurance for the said Canada Atlantic Grain Export Company.

Walter Trappe, the fifth member of the committee who did not sign the award is, your deponent is informed and believes, associated as manager with the Norris Grain Company, grain dealers and ship-
546 pers.

This committee, your deponent has ascertained by investigation is named by the President of the Produce Exchange to sit for a specific period of time, which, your deponent is informed and believes, is one year. The above five men comprised the membership of the Grain Committee as constituted at the time of the hearing of the arbitration herein. No one of them is associated in business with any of the canal carriers, or represents any of the canal carriers.

Henry E. Otto, the proctor for the libellant herein, your deponent has ascertained by investigation, is President of the insurance brokerage firm of Otto & Company, having offices at No. 2 Produce Exchange. Your deponent has ascertained by investigation, and is informed and believes that the firm of Otto & Company acts as insurance brokers for practically all the companies associated with the Produce Exchange or members of the Produce Exchange which have occasion to ship cargoes from lake ports via the New York State Barge Canal, and as insurance brokers has represented or does at 548
the present time represent all of the companies which the above mentioned members of the Grain Committee are associated with.

GERALD A. FAGAN.

Sworn to before me this
20th day of January, 1930.

SHIRLEY GEIER,
N. Y. County No. 723.

549

550 **Replying Affidavit of Henry E. Otto, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

551

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

HENRY E. OTTO, being duly sworn, deposes and says:

I am a member of the firm of Otto & Lyon, proctors for libellant Louis Dreyfus & Company and am familiar with the proceedings heretofore had in this case and have personally appeared before the

552 Grain Committee of the New York Produce Exchange on the arbitration heretofore ordered by this court.

I have read the affidavits of Richard F. Lenahan and Gerald A. Fagan in opposition to libellant's motion to confirm the award of the said arbitration committee.

I deny that the libel proceeds on the theory of tort. The caption in the libel and complaint itself reads:

"In a cause of contract."

Furthermore, the resettlement order dated September 6, 1929, reads in part as follows:

> "Ordered that the said motion be and the same hereby is granted only as to the issues raised by the contract between the libellant and Marine Transit Corporation."

Articles 7, 8 and the first paragraph of Article 9 of the libel itself shows that libellant proceeded on the theory of a bailment and alleged a delivery of grain to the respondent carrier in good order and condition and failure on the part of the carrier to 554
redeliver the cargo to the libellant at New York in like good order and condition as when received. It incidentally sets forth details showing how the grain was damaged.

I specifically deny this shipment was made pursuant to a bill of lading. The contract of August 17, 1928, a copy of which is attached hereto and marked Exhibit 1, incorporating the terms and conditions of the New York Produce Exchange Canal Grain Charter Party No. 1 as amended March 22, 1928 was set forth as an exhibit in the motion papers to refer the controversies between the parties hereto to arbitration.

555

I attach to this affidavit a copy of the New York Produce Exchange Canal Grain Charter Party No. 1 as amended March, 1928.

It will be noted from a reading of the charter party attached hereto that bills of lading must be issued to conform with the said charter party in every respect and furthermore there is no provision in the said charter party with respect to the Harter Act. Although the carrier sets forth the Harter Act as a defense in its answer to the libel it made no reference or claim before the arbitration committee

556 *Replying Affidavit of Henry E. Otto.*

that it was relieved from liability as a result of the said Harter Act. It is my opinion that the Harter Act does not of itself apply to private carriers. In any event, even if it did apply, the carrier waived the provision of the Harter Act in its favor by agreeing to be responsible for its negligence. The charter party in question is one that applies not alone as between the parties in this case but represents a form which originally was prepared by committees representing both the Canal Carriers Association as well as the Produce Exchange and since 1924 the same has been amended on three different
557 occasions prior to the loss in question.

As will appear from the affidavits of Herbert L. Bodman, Wilfred F. Rosar and Fernend Laval, annexed hereto, the amendment to the charter party of March 22, 1928, changing the arbitration committee before whom disputes arising under this contract would be heard and determined, was done at the special instance and request of the committee representing the Canal Carriers Association of which the respondent Marine Transit Corporation was a member. It seems strange, therefore, that respondent should object at this late date to an arbitration before the said committee when it, through
558 its representatives, specifically desired the said committee in preference to another committee which was composed of both shipping and grain interests.

The arbitration before the grain committee was conducted in a perfectly proper manner and the respondent Marine Transit Corporation was allowed to offer in evidence whatever proofs or evidence or testimony it desired to. This arbitration committee did not refuse to receive any testimony which was offered by the said respondent.

In my opinion the carrier failed to prove that the tug was seaworthy. Mr. Fagan, who was vice-president and treasurer of the respondent carrier, to the best of my recollection, admitted on cross examination that he did not know the previous experience or employment of the mate of the tug and stated that some other person in his company employed the mate. The mate was the man at the wheel at the time of the disaster. He was not called as a witness although he was present in the arbitration room on both days that the case was heard. The failure to call a necessary and available witness raises the presumption that the testimony which he would give would be adverse to the carrier. The failure to call the mate also prevented a cross examination on the fitness of the mate and precluded rebuttal testimony which libellant was prepared to offer tending to show the unfitness of the mate and knowledge of the respondent of such unfitness.

I deny the statement made on the bottom of page 3 and the top of page 4 of the affidavit of Mr. Lenahan, stating that the testimony of the libellant's own witnesses offered at the hearing of the grain committee was all to the effect that the damage to the libellants' cargo was caused and occasioned by a collision or contact without any fault on the part of the tug or of anyone for whom the carrier was responsible contributing in any way thereto.

In addition to the failure of the carrier to call the man at the wheel and a necessary and available witness, the libellant called one of the captains of the head barge who was an eye witness to the disaster also a lock tender who was an employee of the United States Government and also an eye witnes Their testimony indicated that the tow approached the lock at an angle which was not the customary

manner of approaching the lock; that the head barge struck the approach wall and was dragged for a distance of from 30 ft. to 50 ft. before she hit the sluice way and subsequently sank.

The libellant also called two expert witnesses who were tugboat captains and the effect of whose testimony was that the tug was negligent. The only witness called by the respondent with respect to the cause of the disaster was the captain of the tug who, to the best of my recollection, admitted on cross examination that he was off watch at the time and did not know the condition of the current at the
563 time and place of disaster and did not know whether the steering apparatus on the barge was set up and further admitted that there were no unusual conditions of navigation and that the disaster occurred in broad daylight. No deck hands or engineers or man at the wheel was called to explain how the disaster occurred. The libellant called Major Myton in charge of the U. S. Engineers, War Department, Albany, N. Y. the effect of whose testimony was that over 100,000 boats had passed through this lock without sinking prior to this disaster; that subsequent to the disaster no recommendations were made by him to the War Depart-
564 ment with respect to any changes and that the water on the day and at the time and place in question was below normal and that there was practically no current. This testimony stands unrebutted. In my opinion, therefore, the libellant made out a very strong case against this respondent.

The United States Circuit Court of Appeals for this Circuit has held that the striking of a stationary object is not a collision in a maritime sense.

The carrier in attempting to set aside the award fails to state any specific charge of any irregularity

or corruption, but seeks to surround this arbitration committee with an atmosphere of partiality which does not exist. This is very unfair insofar as the members of the arbitration committee are concerned because they are representative men appointed by the President of the exchange. They have given their careful consideration to this case, taking eight days to make their decision. This refutes any contention of partiality.

The unfairness is accentuated when it has known that the representatives of this carrier requested that arbitration be had before this very committee. 566
After the result is adverse it now seeks to set aside the award.

In 1919 two brothers, myself and several others organized the insurance brokerage concern, Otto & Company, Inc. Since the early part of 1925, the active handling of the business of this company was entrusted to Mr. Richard H. Schweizer, secretary and director of the company. During the past five years, I have been actively engaged in the practice of the law, first being associated as a member of the firm of Carmody, McLaughlin, Easterday and Otto and now being a member of the firm of Otto & Lyon, as previously set forth. It is true
567
that Otto & Company, Inc. have handled insurance for a number of grain merchants who were members of the Produce Exchange, but this fact was well known to Mr. Gerald A. Fagan, vice-president and treasurer of the Marine Transit Corporation and was also known to Mr. Lenahan proctor for the said company. Although Mr. Fagan was present in the arbitration room with Mr. Lenahan at the time this case was heard by the arbitration committee, no exception to the fact that Otto & Company, Inc. had handled insurance for grain merchants was made to said committee.

568 *Replying Affidavit of Henry E. Otto.*

I deny, however, the statement made in the latter part of the second paragraph on page 5 of Mr. Lenahan's affidavit that Otto & Company, Inc. was the broker "for the various companies or firms which the members of the Grain Committee are associated with". As appears from the annexed affidavit of Mr. Leval, the Marine Transit Corporation has done business with some of the companies represented by the Grain Committee. None of the members of the Grain Committee are interested in libellants' or deponent's business and are not interested financially in this award. Neither is your libellant or
569 your deponent financially interested directly or indirectly in companies or firm or individuals representing said committee.

HENRY E. OTTO.

Sworn to before me this
21st day of January, 1930.

J. R. CARROLL,
Notary Public.

570

Copy of Contract of New York Produce Exchange, Annexed to Affidavit of Henry E. Otto. 571

NEW YORK PRODUCT EXCHANGE

CANAL GRAIN CHARTER PARTY No. 1

(Adopted by the members of the Grain Trade of the New York Produce Exchange at a meeting held May 12, 1924, and approved by the Board of Managers of the New York Produce Exchange May 23, 1924) 572

AMENDED AUGUST 6, 1925, APRIL 1, 1926, MARCH 22, 1928.

IT IS THIS DAY MUTUALLY AGREED

Between .....
(Owners or Agents)

and .....
(Charterers)

573

That the said Owners or Agents will furnish insurable Canal tonnage for grain as below

QUANTITY

.....bushels of.....

PORT OF LOADING

.....

.....

574 *Copy of Contract of New York Produce Exchange.*

DATE OF
LOADING

.....Loading between.....and.....

.....

Unless otherwise agreed boats must be tendered at loading port properly passed by the surveyors for underwriters as being ready to load between the hours of 9 A. M. and 5 P. M., but if boat or boats tendered are seaworthy and are properly passed on arrival of said surveyor, then if boat or boats have
575 tendered within contract period, no penalty is collectible by charterer.

DESTINATION

.....

RATE

.....cents per bushel of.....pounds, delivered weight, exclusive of elevation at ports of loading, but including trimming, transportation to destination, and delivery at any point accessible by water within the free lighterage limits of New
576 York Harbor, except deliveries to Newtown Creek and Gowanus Canal, which shall be subject to additional towing charges to cover cost of movement between mouth of Newtown Creek and destination and Court Street and destination.

INSURANCE

Unless specifically excluded at time of chartering Freight Rate includes Marine Insurance on cargo, freight and import duty, if any, which is to be covered by Charterer and premium to be deducted

from the freight. Amounts insured to be reported to the Underwriters separately as follows:

1—Value of merchandise (including elevation and costs, if any) figured at market value of merchandise at loading port at time of loading plus 5½. In case of disagreement value to be fixed by the Grain Committee of the New York Produce Exchange, which will be final.

Any additional value desired may be placed by charterers at their expense. 578

2—Duty, if any.

3—Freight.

Insurance covering Carriers Legal Liability must be placed by Carriers at their own expense, proper binder to be furnished Charterers if requested.

GENERAL AVERAGE

General Average and/or salvage charges to be adjusted according to the rules and customs of the Port of New York. 579

BONDS

Canal Companies to clear all United States Government T&E Bonds.

Owners of the grain must notify carriers in writing when ordering bonded grain for elevator. In absence of such notice from the owners of the grain,

the owners will assume any penalties imposed upon the carriers by the Government.

WHARFAGE CHARGES

Canal Companies to pay customary wharfage charges, if any, in New York Harbor.

If charterer orders grain to steamer before permitted by said steamer he shall be liable for any wharfage charges incurred at ship's side until beginning of time permitted by steamer.

581

DEMURRAGE

A. The Charterer (or his agent or assigns) is to be entitled to three (3) days, exclusive of Sundays and legal holidays (Saturday afternoon not to be construed as a holiday) to unload. Official written notice of arrival at 53rd Street, North River, or other canal terminal south thereof (unless advance orders have been placed) must be delivered to Charterer (or his agent or assigns), free time to commence from the first 12 o'clock noon, New York City time, following delivery of such notice. At the expiration of free time period, the demurrage rate
582 shall be four (4) cents per ton of 2000 lbs. per day on actual amount of grain loaded into boats.

B. Boats shall have the option to discharge on arrival (if orders have not been filed) into a public elevator at their own expense, and give free lighterage outward to final delivery. Written notice of such intention to discharge shall be given Charterer twenty-four (24) hours prior to ordering to such elevator. Storage at the rate of 1/20c. per bushel per day is to be paid by Charterers after three (3) days' free time has elapsed. Insurance

is to be covered by owners of the grain. Charterer (or his agent or assigns) is to be entitled to as many delivery orders as there were boats delivered to elevator for his account, insurance risk for any lighterage delivery from elevator to be assumed by owners of grain, no order to be for less than 8,000 bushels, unless extra expense due to small quantity is paid by Charterer, and no credit to be given for any unused portion of this privilege.

Carrier shall have further option of transferring cargoes to other insurable barges (boat for boat) instead of to a public elevator under conditions of 584
paragraph next above, except that demurrage rates applying to original barges, shall apply in place of designated elevator storage rate. This shall not be construed as final delivery.

C. If cargo is stored in elevator in accordance with Paragraph B above, Charterer (or his agent or assigns) shall have the option of accepting final delivery in elevator at any time prior to ordering out of same, in which case elevation and storage from date of elevation must be assumed by him.

DETENTION

A fleet shall consist of boat or boats, as desig- 585
nated by carrier at time of booking, and adequate motive power to tow the boat or boats to destination with continuous movement and under ordinary circumstances. A fleet shall sail within 24 hours of completion of loading and proceed to destination without delay, except that due to accidents, Acts of God, strikes, lockouts, fires, or rendering necessary aid to other vessels in distress or danger. Owners shall pay charterers demurrage at rate of 4c per ton of 2000 lbs. per day, or fraction thereof, for any

detention at loading port beginning 24 hours after completion of loading and until beginning of voyage; also for any unnecessary (avoidable by ordinary care) delay enroute, but no demurrage is chargeable for any detention at loading port between loading dates specified in charter party if operator notifies charterer before loading that boats will not move until last date. This paragraph is not applicable to any unit less than a fleet defined above, as regards delay at port of loading but does apply otherwise.

587 OUTTURN:

Official weight certificates covering quantity loaded shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received inward and to be delivered on final delivery.

The boat owner and/or operator and/or carrier shall be responsible for all damage caused by their negligence or fault but shall not be liable for losses caused by dangers of navigation, fire or collision, except where caused by their negligence or fault. Neither shall they be liable for acts of God, quarantine or the public enemy. The carrier shall be

588 paid in full by consignee for any excess cargo delivered at destination, and any shortage in delivery in excess of 1/8 of 1% of intake weight shall be paid for by the carrier, at the market price of a like kind and grade of grain at New York on the day when shipment is delivered, and final quantity determined; these adjustments to be made in cash at time of payment of freight.

In case the grain becomes heated while in transit (such heating not being caused by leakage of boat, or heat from boiler or machinery) the Carrier shall

deliver his entire cargo and collect his entire freight charges on bill of lading weights.

SEPARATE CHARGERS:

Each boatload (or parcel, if less than a boatload) is to be deemed a separate charter.

CANCELLATION CLAUSE:

If grain is not ready for boats when tendered within contract period, charterers will have an extension of five days at a penalty of ½¢ per bushel. If grain is not ready within this additional period, 590 boat owners have the option of cancelling charter or rechartering; loss in freight, if any, of rechartering to be paid by charterer.

If carrier fails to tender boat or boats in contract period, an extension of five days will be allowed at penalty of ½¢ per bushel. If boats are not tendered within this additional period, charterers have the option of cancelling charter or rechartering; the extra expense, if any, of rechartering to be paid by boats.

After November 5th, of each year, the options referred to in the two preceding paragraphs may be exercised at end of contract period. In such 591 event, should the boats be unable to secure other cargo before official closing date, charterers shall be liable to them for the full amount of freight called for in the charter party. Similarly should charterers be unable to recharter before official closing date or if able to re-charter but unable to secure insurance equal to charterers customary policy, boats shall be liable for the extra cost of delivery to destination via railroad.

592 *Copy of Contract of New York Produce Exchange.*

PAYMENT OF FREIGHT:

80% of the total freight is due and payable on arrival of boats at Destination, the balance, together with demurrage and towing and/or other proper charges is due and payable after delivery has been made and actual outturn weights ascertained, subject to deduction of shortage allowances, or other substantiated claims under this particular charter.

If shortage amounts to more than 20%, carrier shall refund to the cargo owner any freight paid on
593 any shortage in excess of said 20%.

Freight is guaranteed and payable vessel or cargo lost or not lost.

In the event of loss or damage which requires return of cargo to the point of shipment or the discharge of cargo at any intermediate point or place on the voyage the full freight thereon shall be deemed to have been earned and shall be paid accordingly, but no additional freight shall be paid on grain forwarded from point of loss or damage to destination on same voyage and in the original vessel.

TOWING:

594

The Charterer to be entitled to one free-delivery on each boat within the lighterage limits of New York Harbor, and to one elevator loading on a boat at loading port. The charterer shall pay for any additional tows beyond this amount at prevailing rates. This applies to canal boats arriving afloat and does not affect deliveries to elevator under demurrage Clause B.

BILLS OF LADING:

Bills of lading must be issued to conform with this charter party in every respect. No additions or

alterations are valid without the written consent of charterers. It is distinctly understood and must be so stated on the Canal bill of lading and the said Canal bill of lading, when properly endorsed, carries full title to the property and that the insurer thereof warrants that a similar quantity and grade of grain has been cancelled from an original lake bill of lading and/or elevator receipt which likewise carried full title.

If grain is billed on original lake documents through from Western lake ports to New York, the issuance of Canal bills of lading will not be required. 596

Original lake or canal bill of lading carrying title to the grain properly endorsed must be surrendered with orders for final delivery, and cancelled by carrier or its agent.

DISPUTES

All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding.

.....
(Owner or Agent) 597

.....
(Charterer)

Date.....19

598 **Replying Affidavit of A. C. Field, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

599 against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

A. C. FIELD, being duly sworn, deposes and says:

I am president of Albert C. Field, Inc. grain merchants.

I am chairman of the Committee on Grain of the
600 New York Produce Exchange, a standing committee of the Exchange, appointed by the president of the Exchange. I was chairman of the said Grain Committee for the past three years.

That on December 11th and December 12th, 1929, the Grain Committee heard the controversy between Louis Dreyfus & Company and the Marine Transit Corporation.

This Committee heard all the testimony which the Marine Transit Corpoartion desired to offer, and did not prevent the said carrier from submitting any evidence.

That this Committee after considerable discussion and deliberation decided on December 20th, 1929 to grant the award to Louis Dreyfus & Company.

That deponent and the members of his Committee were conscientious in the performance of their duties. That the Committee including deponent were sworn to faithfully perform their duty.

That this Committee was not influenced by the fact that Louis Dreyfus & Company was a grain merchant.

That Albert C. Field Inc. have not done business with Otto & Co. Inc. since 1924, and have never done business with Mr. Otto's law firm. 602

That we have, however, done business with the Marine Transit Corporation.

A. C. FIELD.

Sworn to before me this
21st day of January, 1930.

J. R. CARROLL,
Notary Public.

603

604 **Replying Affidavit of Fernand Leval, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

605

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

FERNAND LEVAL, being duly sworn, deposes and says:

606 I am in charge of the New York office of the libellant, Louis Dreyfus & Company. I was a member of the Canal Grain Charter Party Committee of the New York Produce Exchange on and before March, 1928. That I have read the affidavit of Mr. Herbert L. Bodman, Chairman of the said Committee in March, 1928 and do hereby confirm that the same is true in every respect.

It was a Canal Carrier's Committee which met with our committee who requested that the Grain Committee hear and determine disputes in the future instead of the Arbitration Committee of the

Exchange, which had acted for about four years prior thereto.

I deny that libellant's cargo of grain was shipped on the barge Edward A. Ryan pursuant to a bill of lading.

The contract between libellant and respondent, Marine Transit Corporation, was in writing, dated August 17, 1928 and incorporated the terms and conditions of the New York Produce Exchange Canal Grain Charter Party as amended March 22, 1928.

It will be noted that the said charter party specifically provides that bills of lading must be issued 608
to conform with the charter party in every respect and that no alterations or changes may be made except with the written consent of charterer. Bill of Lading was issued by the carrier after the grain had been delivered to it and was not issued to us. Upon information and belief, Mr. Fagan, vice-president and treasurer of the Marine Transit Corporation, knew prior to contracting with us for the transportation of this shipment, that the Arbitration Committee provided for by the contract was composed of grain merchants. He also knew that Otto & Company, Inc., placed insurance for various grain merchants of the Produce Exchange. 609

Upon information and belief Marine Transit Corporation did business with the various grain merchants of the New York Produce Exchange and including some of the firms with which the members of the Grain Committee are associated.

Libellant is not interested in the various companies or firm with which the members of the Grain Committee are associated, and vice versa.

The respondent's attorney brought to the attention of the Grain Committee from the start that

610 *Replying Affidavit of Fernand Leval.*

both libellant and respondent were insured, so that there could be no possibility of partiality shown to libellant because of its being a grain merchant.

FERNAND LEVAL.

Sworn to before me this
21st day of January, 1930.

A. R. CRAWFORD,
Notary Public.

611

612

Replying Affidavit of Herbert L. Bodman, Read in Support of Motion to Confirm Award. 613

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT. 614

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HERBERT L. BODMAN, being duly sworn, deposes and says:

I reside at Glenhead, Nassau County, Long Island. I am President of Milmine Bodman & Co., Inc., grain merchants at No. 2 Broadway, New York City and also am a director in the Seaman's Bank for Savings in New York and trustee of the New York Produce Exchange. 615

On and before March 22nd, 1928 I was Chairman of the Canal Grain Charter Party Committee of the New York Produce Exchange, a special committee appointed by the President of the Exchange to negotiate with a committee of the canal carriers association with respect to canal charter party.

616 Associated with me on the said committee at that time was Mr. Wilfrid F. Rosar and Mr. Fernand Leval. The canal charter party which was adopted in 1924 by the New York Produce Exchange after meeting between a committee of the Produce Exchange and a commitee of the Canal Carriers Association, provided for arbitration before the Arbitration Committee of the New York Produce Exchange. The committee representing the Canal Carriers Association objected to having arbitrations heard and determined by this committee.

617 Our committee did not favor any change of the committee which was to hear and settle disputes under this charter party. It appeared that prior to the conference which the carrier's committee had with our committee that one or more of the canal carriers had arbitrated before this Arbitration Committee and had lost. The canal carriers committee complained that the committee in question was not composed of merchants or forwarders who were active in the business on the canal and that as the questions involved were extremely technical they were not a proper body to act in disputes between the carriers and shippers.

618 I personally took a strong position in this matter and insisted that arbitration be had before this regular committee rather than any other body. Finally, however, in deference to the wishes of the canal carriers and at their special instance and request, we agreed to eliminate the arbitration committee and arbitration was arranged to be had before the grain committee. The members of the Grain Committee were at that time and have been prior and subsequent thereto, members of the grain trade, that is, wen who are representing grain merchants. The grain committee is the standing committee of

the New York Produce Exchange appointed by the president and is frequently used by merchants among themselves to settle technical difficulties where an intimate knowledge of the grain trade is required. The arbitration committee of the New York Produce Exchange to which the canal carriers objected was composed of five men and for the fiscal year ending June, 1928, was composed of two retired grain merchants, one of whom was then President of the North American Grain Association and the other President of a New Jersey bank; two active members of the steamship trade, one of whom 620
at one time was President of the U. S. S. B. E. F. Corp. and Chairman of the Executive Committee of the Chamber of Commerce of the State of New York, and another an active member of the flour trade. All of the five members of the aforesaid committee, with one exception, have been President of the New York Produce Exchange.

HERBERT L. BODMAN.

Sworn to before me this
21st day of January, 1930.

J. R. CARROLL, 621
Notary Public.

622 **Replying Affidavit of Wilfred F. Rosar, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

623 against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILFRED F. ROSAR, being duly sworn, deposes and says:

I reside at 50 Moore Road, Bronxville, New York.

624 I am a member of the firm of John Melady & Company, members of the New York Stock Exchange and other leading exchanges in this country and was on and before March, 1928, a member of the Canal Grain Charter Party Committee of the New York Produce Exchange.

I have read the affidavit of Herbert L. Bodman, Chairman of the Canal Grain Charter Party Committee and do hereby affirm that the same is true in every respect.

The Committee representing the canal carriers met with the committee representing the New York

Produce Exchange and together amended the charter party then existing. It was at the special instance and request of the Carriers' Committee that our committee agreed to and did change the arbitration committee from the regular arbitration committee of the Exchange to the Grain Committee of the Exchange.

WILFRED E. ROSAR.

Sworn to before me this
21st day of January, 1930.

626

(Signature illegible)
Notary Public, Bronx Co. No. 17
N. Y. Co. Clk. No. 1397
Commission expires March 30, 1931

627

628 **Replying Affidavit of Moses Cohen, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

629

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MOSES COHEN, being duly sworn, deposes and says: I reside at 607 West End Avenue, New York City. I am president of the Canada Atlantic Grain Export Co., Inc.

630 That Mr. Bowne, a member of the Grain Committee, is not in any way connected with Canada Atlantic Grain Export Co., Inc. I further state that Mr. Keusch has not been active in the business of the Canada Atlantic Grain Export Co., Inc., for the past three years due to illness and that he has been away from the office for three or four months at a time during the summer period.

MOSES COHEN.

Sworn to before me this
21st day of January, 1930.

J. R. CARROLL,
Notary Public.

Memorandum of Caffey, J., January 24, 1930. 631

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

100/231. 632

I understand that the taking of testimony by the arbitrators was completed December 12, 1929; that the stenographer who took the minutes was selected and is employed either by one of the arbitrators or by a firm of which one of the arbitrators is a member or by an exchange to which all the arbitrators belong; that on December 27, 1929, respondent applied for a copy of the minutes; that the request has 633 not been complied with.

From examining the papers already submitted, my tentative impression is that the case can properly be disposed of without resort to the minutes. Nevertheless, in their affidavits both parties attempt to summarize parts of the testimony before the arbitrators, which I could more satisfactorily consider if I had the minutes, and respondent insists that the motion to confirm the award cannot be justly decided unless I see all the testimony.

634 *Memorandum of Caffey, J.*

The delay in furnishing transcript of the testimony is little less than intolerable. Despite my feeling that the minutes probably will not be needed, the desire of one of the parties to have me examine them seems to me sufficient reason for the court to exert its power, if any, to compel their production.

The arbitration is under the supervision of the court. Unless copy of the minutes be delivered at my chambers by next Wednesday (January 29), I shall make an order on that subject or on the mo-
635 tion. In event the minutes are not received by me at the time specified, I wish both libellant and respondent by noon of the next day to leave at my chambers affidavits (of which each shall serve a copy on the other) showing, with dates and in detail, the efforts made, both preceding and since the making of the present motion, to procure the minutes. I shall also be glad, particularly if the proof discloses supervision or control of the stenographer by any arbitrator, to have memoranda as to the power of the court under the arbitration statute (1) to regard continued failure of the stenographer to furnish copy of the minutes as misconduct by an
636 arbitrator or by the arbitrators and (2) to withhold action on the motion to confirm the award until the minutes are forthcoming or to deny the motion if they be not forthcoming.

Dated, January 24, 1930.

FRANCIS G. CAFFEY,
U. S. D. J.

Memorandum Confirming Award. 637

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the Barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.,

Respondent.

100/231. 638

I think the objections by respondent are not substantial or are not sustained by the record.

The issues heard and decided by the arbitrators were within the terms of the order referring the matter to them, as well as within the terms of the agreement to arbitrate. I discover nothing irregular in the proceedings. 639

Motion to confirm award granted.
Dated, February 1, 1930.

FRANCIS G. CAFFEY,
U. S. D. J.

640 **Order Granting Motion to Confirm Award.**

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Court House in the Borough of Manhattan, on the 7th day of February, 1930.

Present—Honorable FRANCIS G. CAFFEY, *U.S.D.J.*

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and
641 style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

A motion by Libellant having duly come on to be heard before me on the 17th day of January, 1930 for an order confirming the award of the Committee on Grain of the New York Produce Exchange under date of December 20th, 1929.

642 Now upon reading and filing the notice of motion dated December 23, 1929, the affidavit of Henry E. Otto, sworn to on the 23rd day of December, 1929, and exhibits all attached to the notice of motion, the affidavits of Henry E. Otto, A. C. Field, Fernand Leval, Herbert L. Bodman, Wilfred F. Rosar and Moses Cohen, each sworn to on the 21st day of January, 1930, in support of said motion and the affidavits of Richard F. Lenahan and Gerald A. Fagan, each sworn to on the 20th day of January,

1930, in opposition thereto and also the typewritten minutes of the hearings before the said Committee, and after hearing Henry E. Otto of counsel for libellant, in support of said motion, and Richard F. Lenahan of counsel for the Marine Transit Corporation, respondent herein and the claimant of the tug GERALD A. FAGAN, in opposition thereto, and due deliberation having been had, and the Court having filed its opinion in writing, it is, upon motion of Otto & Lyon, proctors for libellant,

ORDERED that the Award of the Committee on Grain of the New York Produce Exchange under 644
date of December 20, 1929, be and the same is, in all respect confirmed, and it is further

ORDERED that Louis Dreyfus & Company, libellant, recover of and from Marine Transit Corporation, the respondent herein, the sum of $23,016.00, plus interest to the date of the award, amounting to $1,668.66, with interest on both amounts, from the date of the award, viz: December 20th, 1929, the costs and expenses of the arbitration amounting to $362.50 to be paid by the Marine Transit Corporation, and it is

645

FURTHER ORDERED that unless the Marine Transit Corporation, respondent, cause payment to be made within ten days after service of a copy of this order, with notice of entry on proctors for respondent, execution issue against Marine Transit Corporation, respondent, and Continental Casualty Company, stipulator for cost and value, their goods, chattels and lands, to satisfy this decree.

FRANCIS G. CAFFEY,
U. S. D. J.

646 **Order to Show Cause, Read in Support of Motion Restraining Libellant from Recovering from the Claimant or Its Stipulators on Behalf of the Tug "Gerald A. Fagan".**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

647 Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and the Barge "JOHN E. ENRIGHT",

Respondent.

Upon the annexed affidavit of Richard F. Lenahan, sworn to the 11th day of February, 1930, and

648 upon the pleadings and proceedings had herein, let the libellant, or its proctors, show cause before this Court at the hearing of admiralty motions, to be held on the 14th day of February, 1930, at 10:30 A. M., or as soon as counsel can be heard, at Room 2, 12th Floor, Woolworth Building, in the Borough of Manhattan, City of New York, why an order should not be made restraining the libellant from recovering from the claimant or its stipulators on behalf of the tug "Gerald A. Fagan", and why the claimant should not have such other and further relief as to this Court may seem just and proper in

649

the premises. In the meantime, and until the hearing and final determination of this motion and the entry of an order thereon, let all proceedings on behalf of the libellant, its attorneys, and the United States Marshal be stayed.

Reasons appearing therefor let service of a copy of this order, together with the annexed affidavit on the proctors for the libellant this day before six P. M. deem sufficient.

Dated, February 11, 1930.

650

HENRY W. GODDARD,
U. S. D. J.

651

652 **Affidavit of Richard F. Lenahan, Read in Support of Motion Restraining Libellant from Recovering.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS DREYFUS, *et al.*,
Libellant,

against

MARINE TRANSIT CORPORATION,
653 Respondent.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

RICHARD F. LENAHAN, being duly sworn, deposes and says: That he is Proctor for the Marine Transit Corporation, respondent herein, and as claimant of the tug "Gerald A. Fagan"; that he has charge of this cause since its inception.

Libel and complaint of Louis Dreyfus and Charles Louis Dreyfus, copartners, doing business
654 under the firm name and style of Louis Dreyfus & Co. against Marine Transit Corporation, the diesel tug "Gerald A. Fagan" and the barge "John E. Enright", was filed in the office of the Clerk of the within named Court on December 14, 1928, Court Docket No. 100-231. Your deponent's office was then retained upon behalf of the Marine Transit Corporation as respondent and as claimant of the tug "Gerald A. Fagan". Answer was filed upon its behalf as respondent and as claimant some time subsequent. A motion was brought on before this Court by the office of Otto & Lyon, proctors for the

libellant, for an order referring this dispute, which arose under the contract between the libellant and the respondent, Marine Transit Corporation, to the Committee on Grain of the New York Produce Exchange, to be arbitrated said motion having been sustained, and where as the controversy existing between Louis Dreyfus and Marine Transit Corporation was, by an order of the United States District Court, in and for the Southern District of New York, dated the 6th day of September, 1929, submitted by them to the Committee on Grain of the New York Produce Exchange as arbitrators for their adjudication and award. 656

The arbitrators having consented to act as such, and having duly met together and deliberately heard the allegations and proofs of the said parties, do arbitrate, adjudge and award of and concerning the said controversy as follows:

The Marine Transit Corporation shall pay to Louis Dreyfus & Co.—$23,016, the loss caused through the sinking of the barge "Edward A. Ryan", plus interest amounting to $1,668.66. Thereupon, the libellant having duly moved for an order confirming the award of the Committee on Grain of the New York Produce Exchange and after due deliberation the said award of the Committee having been confirmed in all respects, whereupon the proctors for the libellant prepared a final decree and order, granting motion to confirm the award, decreeing for a recovery by the libellant of and from the Marine Transit Corporation in accordance with the award. However, in their prayer for relief, they pray for alternative relief as follows: That unless the Marine Transit Corporation, respondent, cause payment to be made within ten days after service of a copy of this order with no- 657

658 *Affidavit of Richard F. Lenahan.*

tice of entry on the proctors for the respondent, execution issue against Marine Transit Corporation, respondent, and Continental Casualty Company, stipulator for costs and value, their goods, chattels and lands to satisfy this decree. The prayer for relief is entirely inconsistent with the findings of the Committee on Grain and the procedure had herein.

Your deponent prays for an order restraining the libellant from recovering from the claimant or its stipulators on the tug "Gerald A. Fagan".

659 No previous application for this order has been made.

R. F. LENAHAN.

Sworn to before me this 11th day of February, 1930.

JOHN E. BROWNE.

660

Affidavit of Henry E. Otto, Read in Opposition to Motion Restraining Libellant from Recovering.

661

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

662

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT,

Respondent.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HENRY E. OTTO, being duly sworn, says: I am a member of the firm of Otto & Lyon, proctors for the libellants, Louis Dreyfus & Company, and have 663 had sole charge of this case since its inception.

On or about the 4th day of October, 1929, Mr. Lenahan, proctor for the Marine Transit Corporation, which is respondent as well as claimant of the tug Gerald A. Fagan, made application to the Arbitration Committee for an adjournment of about two months. At that time Mr. Lenahan stated that libellants would not be prejudiced by such adjournment, inasmuch as libellants had a stipulation for value.

664 *Affidavit of Henry E. Otto.*

On the 27th day of December, 1929, upon the return of the motion to confirm the award, Mr. Lamb, one of the proctors for the Marine Transit Corporation, requested an adjournment, contending that libellant would not be prejudiced by the delay inasmuch as libellants were secured by a stipulation for value. Again after four adjournments, all at the request of proctors for respondent-claimant, the motion came on to be heard on the 17th day of January. Mr. Lenahan was not present in the morning and the Court set the time for argument
665 at 2:00 P. M. of the said day. At that time Mr. Lenahan was present and again requested a delay, setting forth the fact that the libellants had a stipution for value so they would not be prejudiced.

WHEREFORE deponent respectfully requests that the motion to restrain libellants from recovering from the claimant or its stipulators, be in all respects denied.

HENRY E. OTTO.

Sworn to before me this 14th day of February, 1930.

666

WILLIAM H. CRAWFORD,
Notary Public,
Kings County.
Kings Co. Clks. No. 499, Reg. No. 1119
N. Y. Co. Clks. No. 237, Reg. No. 1C193
Queens Co. Clk. No. 1166, Reg. No. 8262
Bronx Co. Clks. No. 60, Reg. No. 3172A
Certificates filed in Westchester Co.
Certificate filed in Richmond Co.
Commission expires March 30, 1931.

Memorandum of Caffey, J., Denying Order to Show Cause. 667

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT

Respondent.

A 100-231

668

In consequence of the proceeding being in rem, libellant would have been entitled to have the tug arrested and held as security for the cause of action alleged in the libel. The stipulation for value stands in the place of the tug as security and is subject to the authority of the court that would be applicable to the tug if it were now in custody 669 (*United States* v. *Ames*, 99 U. S. 35, 36). By force of the arbitration statute (9 U. S. C. Sec. 8) the reference to arbitration of the dispute, covered by the pleadings, did not diminish or impair the jurisdiction of this court to make the same decree that it would have granted if, after trial, it had reached the same conclusion as the arbitrators. If a plenary trial had occurred, then, according to the usual practice in admiralty, the court might properly direct execution against the stipulator for enforce-

670 *Memorandum of Caffey, J., Denying Order to Show Cause.*

ment of the decree (*The Wanata* v. *Avery*, 95 U. S. 600, 616). This would be in conformity with local admiralty rule 8, as well as the condition of the stipulation itself. For this purpose notice to the stipulator is not required and the decree may be entered summarily (28 U. S. C., Sec. 754; *The Belgenland*, 108 U. S. 153, 156; *Johnson* v. *Chicago and Pacific Elevator Co.*, 119 U. S. 338, 401). It follows that inclusion in the decree on the award of the provision it contains with respect to execu-
671 tion against the stipulator is correct.

Motion denied.

Dated, February 27, 1930.

FRANCIS G. CAFFEY,
U. S. D. J.

672

Order Denying Motion to Restrain Libellant from Recovering from Claimant or Its Stipulators on Behalf of Tug Gerald A. Fagan. 673

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Courthouse in the Borough of Manhattan, on the 7th day of March, 1930.

Present—Honorable FRANCIS G. CAFFEY, *U. S. D. J.*

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY, 674

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

An order to show cause why an order should not be made restraining the libellant from recovering from the claimant or its stipulators on behalf of 675 the tug GERALD A. FAGAN, having duly come on to be heard before me on the 14th day of February, 1930.

Now, on reading and filing the order to show cause dated the 11th day of February, 1930, the affidavit of R. F. Lenahan, sworn to on the 11th day of February, 1930 in support of the order to show cause and the affidavit of Henry E. Otto, sworn to on the 14th day of February, 1930, in opposition thereto and due deliberation having

676 *Order Denying Motion to Restrain Libellant from Recovering from Claimant or Its Stipulators on Behalf of Tug Gerald A. Fagan.*

been had and the court having filed its opinion in writing, it is, upon motion of Otto & Lyon, proctors for the libellant,

ORDERED, that the motion be and the same hereby is, in all respect, denied; and it is

FURTHER ORDERED, that the libellant may recover of and from the Marine Transit Corporation, or its stipulators.

677

FRANCIS G. CAFFEY,
U. S. D. J.

678

Notice of Appeal. 679

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and Barge "JOHN E. ENRIGHT",

Respondent.

680

A 100/231.

SIRS:

PLEASE TAKE NOTICE that Marine Transit Corporation, claimant and respondent in the above enumerated cause, hereby appeals to the United States Circuit Court of Appeals, for the Second Circuit, from the final decree entered herein on the 8th day 681

682 *Notice of Appeal.*

of February, 1930, and from each and every part of said decree.

Dated: New York, N. Y., March 3rd, 1930.

Yours, etc.,

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Claimant & Respondent,
Office & P. O. Address:
No. 44 Beaver Street,
Borough of Manhattan,
City of New York.

683

To:
ALEXANDER GILCHRIST, JR.,
Clerk of the Court.

OTTO & LYON, Esqs.,
Proctors for Libellant,
Office & P. O. Address,
No. 60 Broad Street,
Borough of Manhattan,
City of New York.

684

Assignments of Error. 685

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, 686

Respondent,

Diesel Tug "GERALD A. FAGAN", MARINE TRANSIT CORPORATION,

Claimant,

and

Barge "JOHN E. ENRIGHT".

MARINE TRANSIT CORPORATION, respondent and claimant of the tug "GERALD A. FAGAN", hereby assigns error to the decree and proceedings of this 687 Court as follows:

1. In ordering and directing the arbitration of any of the issues in this action.

2. In holding that there were any issues raised by the pleadings in this action which were arbitrable under the grain charter party agreement entered into between libellant and respondent, Marine Transit Corporation.

688 *Assignments of Error.*

3. In failing to hold that the issues raised by the pleadings in this action were not such disputes as were contemplated under the arbitration clause of the said grain charter party agreement.

4. In failing to hold that there were no issues raised by the pleadings in this action of such a nature and character as to be severable from the other issues in the suit and separately capable of arbitration under the said grain charter party agreement.

689 5. In confirming the award of the arbitrators herein.

6. In failing to hold that the arbitrators exceeded their powers.

7. In failing to hold that the award of the arbitrators was outside the scope of the issues referred to them by the terms of the order of this Court.

8. In failing to hold that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter sub-
690 mitted was not made.

9. In failing to find that there was no evidence of negligence on the part of the respondent adduced before the arbitrators.

10. In failing to find that there was evident partiality in the arbitrators concurring in the award.

11. In failing to vacate the award of the arbitrators.

12. In failing to modify the award of the arbitrators upon the ground that in making their award, they necessarily passed upon, determined, and awarded upon matters not submitted to them under the order of this Court.

13. In that the District Court failed to take such further proceedings as were necessary for a final determination of the issues raised by the pleadings in this action.

14. In failing to hold that Marine Transit Corporation as respondent herein was entitled to the benefits of the Harter Act. 692

15. In failing to hold that Marine Transit Corporation as claimant of the tug "Gerald A. Fagan" was entitled to the benefits of the Harter Act.

16. In failing to vacate the award of the arbitrators and to dismiss the libel herein on the ground that Marine Transit Corporation had in the testimony taken before the arbitrators established its right to the benefits of the Harter Act, both as respondent and as claimant of the tug "Gerald A. Fagan" or in failing to take such further proceedings as were necessary to give Marine Transit Corporation an opportunity to prove compliance with the provisions of the Harter Act and its right to the benefits thereof. 693

17. In that the barge "John E. Enright" not being before the arbitrators, this Court by its confirmation of the award of the arbitrators and the entry of its final decree has precluded the Marine Transit Corporation from showing that if there was any negligence in connection with the loss or dam-

694 *Assignments of Error.*

age of libellant's cargo, such negligence was primarily that of the barge "John E. Enright".

18. In directing by its final decree herein the issuance of execution against Continental Casualty Company, the stipulator for value on the bond posted herein on behalf of the tug "Gerald A. Fagan", although no issues respecting the liability of the tug "Gerald A. Fagan" in rem was submitted to the arbitrators under the order of this Court and although the award of the arbitrators did not and could not have determined any in rem liability on
695 the part of the said steamtug.

Dated: New York, N. Y., May , 1930.

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Claimant & Respondent,
Office & P. O. Address:
No. 44 Beaver Street,
Borough of Manhattan,
City of New York.

To:

ALEXANDER GILCHRIST, Esq., Clerk,
United States District Court,
Southern District of New York.

696 Messrs. OTTO & LYON;
Proctors for Libellant,
Office & P. O. Address,
No. 60 Broad Street,
New York, N. Y.

THOMAS A. MCDONALD, Esq.,
Proctor for Barge "John E. Enright",
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Additional Assignments of Error. 697

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellant-Appellee,

against

MARINE TRANSIT CORPORATION, 698
Respondent-Appellant,

Diesel Tug "GERALD A. FAGAN",
MARINE TRANSIT CORPORATION,
Claimant-Appellant,

and

Barge "JOHN E. ENRIGHT".

MARINE TRANSIT CORPORATION, respondent and claimant of the tug "Gerald A. Fagan" hereby assigns additional errors to the final decree and proceedings of this Court, as follows: 699

1. The Court below erred in entering the orders of August 28th, 1929 and of September 21, 1929, ordering the Marine Transit Corporation to submit to arbitration the issues raised by the contract between it and the libellant as the contract between them did not fall within the terms of the Arbitration Act of Congress enacted February 12, 1925.

700 *Additional Assignments of Error.*

2. The Court erred in entering said orders, as it lacked any jurisdiction to order said matters to be arbitrated under the provisions of the said Arbitration Act, enacted on February 12, 1925.

3. The Court erred in entering said orders as said Arbitration Act, enacted by Congress on February 12, 1925, is invalid, being in conflict with Section 1 of Article 3 and of Clause 1, Section 2 of Article 3 of the Constitution of the United States.

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MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Marine Transit Corporation, Claimant and Respondent.

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Order Discontinuing Action as to Barge "John E. Enright". 703

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, Diesel tug "Gerald A. Fagan", Barge "John E. Enright",

Respondents,

JOHN E. WALL, Claimant of the barge "John E. Enright".

Docket 704
100-231.

Upon the annexed consent of proctors for the respective parties hereto, and upon motion of Thomas A. McDonald, proctor for the claimant, John E. Wall, it is hereby 705

ORDERED that the above entitled action be and the same hereby is discontinued as against the canal barge "John E. Enright".

Dated, New York City, March 25th, 1930.

ALEX GILCHRIST, JR.,
Clerk.

706 *Order Discontinuing Action as to Barge "John E. Enright".*

We hereby consent to the entry of the foregoing order.

OTTO & LYON,
Proctors for Libellant.

THOMAS A. MCDONALD,
Proctor for Claimant.

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Stipulation as to Exhibits. 709

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and Barge "JOHN E. ENRIGHT", 710

Claimant.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that exhibits marked Marine A and L. Dreyfus #5, photographs, and three exhibits, L. D. A. 1 and two marked A. R. C. 12/11/29, which are blue prints, be not printed in the transcript of record on appeal but same may be handed up by either party on the argument.

Dated: New York, N. Y., August 21, 1930. 711

OTTO & LYON,
Proctors for Libellant.

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Claimant.

So ordered.

....., U. S. D. J.

14-987
McC/EE

712 **Stipulation as to Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

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MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and Barge "JOHN E. ENRIGHT",

Respondent.

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, November , 1930.

714 MACKLIN, BROWN, LENAHAN & SPEER,
Attorneys for Respondents-Appellants.

OTTO & LYON,
Attorneys for Libellant-Appellee.

Clerk's Certificate.

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UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and Barge "JOHN E. ENRIGHT",

Respondent.

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I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City 717
of , in the Southern District of New York, this day of , in the year of our Lord one thousand nine hundred and thirty and of the Independence of the said United States the one hundred and fifty-fifth.

CHARLES WEISER,
Clerk.

(Seal)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1930

No. 293

Argued March 12, 1931. Decided April 20, 1931

LOUIS DREYFUS and CHARLES LOUIS DREYFUS, Copartners, Doing Business under the Firm Name and Style of Louis Dreyfus & Company, Libelants-Appellees,

v.

MARINE TRANSIT CORPORATION, Respondent-Appellant; the Diesel Tug Gerald A. Fagan, Marine Transit Corporation, Claimant-Appellant, and the Barge John E. Enright

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Chase, Circuit Judges

OPINION

Appeal from the District Court for the Southern District of New York from a final decree in admiralty entered upon the award of arbitrators. The libel was filed by Louis Dreyfus and Charles Louis Dreyfus, copartners, against the Marine Transit Corporation and the tug Gerald A. Fagan. An order was entered directing that an arbitration proceeding provided for in the contract of transportation be had. From the decree entered on that arbitration award, the Marine Transit Corporation and the tug Gerald A. Fagan, appeal. Decree affirmed.

Macklin, Brown, Lenahan & Speer, of New York City (Horace L. Cheyney, of New York City, of counsel), for appellants.

Otto & Lyon, of New York City (George V. A. McCloskey, of New York City, of counsel), for appellees.

MANTON, Circuit Judge:

A final decree in admiralty was entered below, on an award of arbitrators, in a proceeding under section 8 of

the United States Arbitration Act (43 Stat. 884, title 9, U. S. Code § 8 [9 U. S. C. A. § 8]). The controversy arose under a contract whereby appellant agreed to furnish appellee as charterer insurable canal tonnage for about 200,000 bushels of wheat on the Buffalo to New York part of an international carriage from Ft. William, Ont., for export. This cargo was "in bond for export," covered by a bill of lading, as to 19,200 bushels, which was laden upon the barge Edward A. Ryan, for the loss of which this libel was filed and seizure of the tug made. The Ryan, with two other barges, was in tow of the appellant tug Fagan on September 25, 1928, when, on entering the government lock at Troy, N. Y., the Ryan came in contact with the guide wall and sank with its cargo. The libel is in rem against the tug Fagan and the barge Enright and in personam against the appellant, Marine Transit Corporation. The appellant appeared and filed a claim in rem and gave a stipultion for value to relese the tug. The contract included an arbitration provision requiring disputes thereunder to be arbitrated before the Committee on Grain of the New York Produce Exchange. The court ordered the appellant to submit to arbitration all issues under the contract. The arbitration proceeded, and an award was made against the appellant and later confirmed by the court below, and the decree appealed from was entered. Later a motion to restrain the recovery on this decree was denied. A discontinuance was entered against the barge Enright.

Section 8 of the Arbitration Act provides:

"That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

Appellant argues that the Arbitration Act is invalid because in conflict with section 1, art. 3, of the Constitution, providing that the judicial power of the United States shall be vested in the Supreme Court and such inferior

courts as Congress may from time to time ordain and establish, and because section 2, art. 3, of the Constitution, provides that the judicial power shall extend "to all Cases of admiralty and maritime Jurisdiction," and therefore "Congress cannot vest any judicial power in any body otherwise than a court duly created." Moreover, the argument proceeds, there can be no delegation of this judicial power of the courts either by the courts themselves or by Congress. The Supreme Court and its original jurisdiction was prescribed by the Constitution. Inferior federal courts have only statutory jurisdiction, and Congress may grant as much or little of the judicial power as it will. It has been long settled that the District Courts have only such right to jurisdiction as Congress grants, and it may withhold jurisdiction in accordance with the procedural requirements of Congressional enactment. Jackson v. Steamboat Magnolia, 20 How. 296, 15 L. Ed. 909.

The Arbitration Act is a procedural statute and within the competency of Congress. Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Article 1, § 8, clause 18. This includes the power to establish courts, power over interstate and foreign commerce (article 1, § 8, clause 3), and jurisdiction over admiralty and maritime matters (article 3, § 2, clause 1). The Arbitration Act is directed solely to a remedy. Atlantic Fruit Co. v. Red Cross Line, 5 F. (2) 218 (C. C. A. 2); Matter of Berkovitz v. Arbib & Houlberg, 230 N. Y. 261, 130 N. E. 288. The validity of a clause providing arbitration under the New York Arbitration Act (Consol. Laws, c. 72) was held no constitutional impediment in Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 44 S. Ct. 274, 276, 68 L. Ed. 582. In that case it was said that agreements in admiralty to submit controversies to arbitration were valid and "reference of maritime controversies to arbitration had long been common practice."

The act does not deprive the District Court of jurisdiction, but seems to enlarge that jurisdiction so as to embrace the enforcement of arbitration agreements not only by ordering such arbitration to proceed, but by entering a

decree upon the award. The Supreme Court said in Red Cross Line v. Atlantic Fruit Co., supra (at page 123 of 264 U. S., 44 S. Ct. 274, 277): "The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy." And that "the substantive right created by an agreement to submit its disputes to arbitration is recognized as a perfect obligation."

The power under section 8 to enforce specific performance of the contract to arbitrate is but a remedy incident to jurisdiction under the act. Hartford Accident Co. v. Southern Pacific, 273 U. S. 207, 47 S. Ct. 357, 71 L. Ed. 612; Morse Drydock Co. v. The Northern Star, 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082. The loss of cargo was a proper subject for arbitration under the contract; it was a subject-matter the parties intended to arbitrate if a loss occurred.

The suggestion that the grain committee was not qualified to pass upon the questions presented is sufficiently answered by the fact that the parties selected them to do so. The claim that the committee had no regard for the defense under the provisions of the Harter Act (46 U. S. C. A. §§ 190-195) is without merit. The New York Produce Exchange canal grain charter party No. 1 excludes the application of the Harter Act by its provisions. The criticism of the sufficiency of the libel is equally without merit. It is immaterial whether the libel against the appellant sounds in tort or in contract. Dampskibs Aktieselskabet Thor v. Tropical Fruit Co., 281 F. 740 (C. C. A. 2). That the award was not signed by all the arbitrators is not a barrier forbidding entry of the decree. There is no provision of the contract cited nor does the act of Congress require unanimity. A committee of four out of five signed the award.

But it is said the grain was not established to be for foreign shipment. It was shipped to the order of the Bank of Nova Scotia from Ft. William, Ontario, and "in bond for export," and appellant's bill of lading provided: "Deliver only on surrender of original Lake Bill of Lading properly endorsed." The lake bill of lading recognized the shipment as international. The bond is given by the carrier. Section 551 of the Act of Sept. 21, 1922, 42 Stat. 975, section 451, title 19, U. S. Code (19 U. S. C. A. § 451).

See B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166, 43 S. Ct. 28, 67 L. Ed. 189.

Since it was an international carriage, there is no doubt the Arbitration Act applies. But section 8 provides, as the basis of jurisdiction, an admiralty cause of action involving libel and seizure, and it declares such basis of jurisdiction to be independent of the provisions of the act "notwithstanding anything herein to the contrary." From an examination of this act, it will appear that the terms "maritime transactions" and "commerce" defined in section 1, are found again in section 2 (9 U. S. C. A. §§ 1, 2). Sections 4 and 8 (9 U. S. C. A. §§ 4, 8), which permit applications to the court, make no reference to these terms.

The parties claiming to be aggrieved at bar were the appellees as they applied under section 8 of the Arbitration Act because of the appellant's "failure, neglect, or refusal * * * to arbitrate under a written agreement for arbitration" (section 4), and nothing in either section 4 or 8 confines such written agreement for arbitration to agreements involving maritime transactions in the limited sense. Section 1, with reference to foreign commerce as distinguished from any other subject-matter of which a court of admiralty would have jurisdiction under the Judicial Code in the terms of section 4 or apart from the arbitration agreement, covers matters which would be justiciable in admiralty under section 8.

The canal was used here as a waterway for foreign commerce—from Canada for export. It is a waterway within the scope of the admiralty jurisdiction. The Robt. W. Parsons, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73. Section 8 is ample authority for entering the decree upon the award. The basis of jurisdiction was a cause of action justiciable in admiralty. The court enjoined the libel filed, and appellant gave the stipulation for value. Section 8 under these circumstances gave free hand to the admiralty jurisdiction, substituting arbitration for trial before the court with the "usual course of admiralty proceedings."

The libel and seizure was a proceeding in rem. There was the direction that the parties proceed with the arbitration and entry of a decree upon the award. The decree necessarily would be in the usual form of a decree in rem, against the res if not released, or against the claimant and stipulators, if the stipulation is substituted for the vessel.

The appellant appears as respondent in the personam libel and as claimant in the in rem proceeding. This practice is common. Merritt & Chapman v. Chubb, etc., Co., 113 F. 173 (C. C. A. 2). The libel was maintainable in rem, and the stipulation given as a substitute for the vessel makes the stipulator liable to the exercise of every authority in the power of the court which it could exercise if the res was still in the court's custody. The Wanata, 95 U. S. 600, 24 L. Ed. 461; The Palmyra, 25 U. S. (12 Wheat.) 1, 6 L. Ed. 531; The Glide, 72 F. 200 (C. C. A. 4); The New York, 104 F. 561 (C. C. A. 6).

Admiralty Rule 8 (Southern District) provides:

"Such stipulation shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate."

Section 8 of the Arbitration Act contemplated that the liability arbitrated between the parties was a liability that attached to the tug as well as to the owner in personam. The objection that error was committed in entering a decree against the stipulator therefore is without force.

Decree affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

LOUIS DREYFUS and CHARLES DREYFUS, Copartners, etc., Libellants-Appellees,

v.

MARINE TRANSIT CORPORATION, Respondent-Appellant; Diesel Tug Gerald A. Fagan, Marine Transit Corporation, Claimant-Appellant, et al.

DECREE—Filed April 27, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,986. U. S. Circuit Court of Appeals, Second Circuit. Term No. 172. Marine Transit Corporation and Tug "Gerald A. Fagan", by Marine Transit Corporation, claimant, petitioner, vs. Louis Louis Dreyfus and Charles Louis Dreyfus, etc. Petition for a writ of certiorari and exhibit thereto. Filed June 20, 1931. File No. 35,986.